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No. .....

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BOARD OF TRUSTEES, MIAMI TOWNSHIP,
Petitioner,

v.

CITY OF MIAMISBURG,
CITY OF WEST CARROLLTON,
CITY OF MORAINE, and
ROBERT L. RODERER, Auditor of
Montgomery County, Ohio,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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I. QUESTION PRESENTED FOR REVIEW

Does a judicial interpretation that the term "township", for purposes of Ohio Rev. Code Ann. § 709.19, includes a nondetached but not a detached municipal corporation, defeat the intent and objective of that statute, which is to compensate townships whose tax base is severely eroded by massive municipal annexations and deny the petitioner, as well as detached municipal corporations, equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution?

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IN THE

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

The Petitioner, Board of Trustees, Miami Township, prays that a writ of certiorari issue to review the judgment and opinions of the Second District Court of Appeals for Montgomery County, Ohio entered in this proceeding on December 27, 1983.

II. OPINIONS BELOW

The opinion of the Common Pleas Court for Montgomery County, Ohio, entered March 30, 1983, appears in the appendix to this petition as does the opinion of the Court of Appeals for Montgomery County, Ohio, which was entered December 27, 1983.

III. JURISDICTION

The Court of Appeals for Montgomery County, Ohio, rendered its decision on December 15, 1983. On December 27, 1983, the Court of Appeals filed a Final Entry of Judgment pursuant to said opinion. Subsequently, the petitioner filed in the Supreme Court of Ohio a Motion for an Order Directing the Court of Appeals for Montgomery County to Certify its Record. The Supreme Court of Ohio overruled this motion on April 4, 1984. The petitioner then filed a Motion for Rehearing with the Supreme Court of Ohio which was denied on May 9, 1984.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

The petition asserts that the judicial interpretation given Ohio Rev. Code. Ann. § 709.19 (Page Supp. 1983) renders it unconstitutional as so interpreted. Therefore, 28 U.S.C. § 2403(b) may be applicable, and pursuant to Supreme Court Rule 28, notice of this petition has been served upon the Ohio Attorney General.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fourteenth Amendment to the United States Constitution Section 1:

> ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

B. Ohio Revised Code Annotated Section 503.07 (Page 1979)

When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the

majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township.

C. Ohio Revised Code Annotated Section 709.19 (Page Supp. 1983)

The text of this statutory provision appears in the appendix to this petition.

V. STATEMENT OF THE CASE

On October 7, 1980, the respondent, City of Miamisburg, Ohio, completed two unusual and significant annexations of the territory of the petitioner, Miami Township, with the enactment of ordinances accepting annexation of approximately 342 acres along State Route 741 and 277 acres at the extreme southwest edge of the city containing a small vacant isthmus-shaped parcel and a gigantic O. H. Hutchings electric power plant. Certain substantially smaller annexations of the petitioner's territory were also accomplished by the respondents, Cities of West Carrollton, Ohio and Moraine, Ohio during the period from August 10, 1980 through August 9, 1981.

The respondent, City of Miamisburg, although a separate municipal corporation exercising its independent taxation powers, has never taken the action under Section 503.07 of the Ohio Revised Code to detach

itself from the surrounding Miami Township. The respondent, City of West Carrollton, has taken such action with all its territory, while the respondent, City of Moraine, is partially detached. Within their respective boundaries, each of the three respondent municipal corporations exercise the full taxation powers afforded to municipal corporations under the laws of the State of Ohio.

At the same time that the Miamisburg annexations were pending, a bill was pending in the Ohio Legislature which would have a dramatic impact on how cities might evaluate the financial benefits and burdens of massive municipal annexations of township territory. The bill, Senate Bill 138, was enacted into law effective December 27, 1979, well prior to the effective dates of any annexations which are a subject of this litigation. Senate Bill 138 is now codified as Ohio Rev. Code. Ann. §709.19 (Page Supp. 1983). The legislative intent behind the enactment of Section 709.19 was to provide an adjustment period for a township after significant municipal annexations of its tax-rich territory. The statute was designed for the purpose of preserving the township as a viable form of local government by protecting those very finances necessary for the maintenance of vital township services, such as police protection, fire prevention, and street maintenance. The statute requires an annexing municipal corporation to compensate the township, pursuant to a phase-down formula, for all taxes generated by the township in the lands which are subject to the annexation.

While the annexations which are the subject of this case were pending, the respondent, City of Miamisburg had entered into negotiations with the petitioner regarding their payment of $75,000.00 per year for ten years to the petitioner as a "settlement" of their differences. These settlement negotiations were encouraged by the Montgomery County Commission. However, the negotiations for set-

tlement were called off following the county's receipt of a legal opinion that the Montgomery County Commission then lacked the authority to compel such a settlement.

To this date, no compensation has been paid by the respondents, Miamisburg, West Carrollton or Moraine to petitioner as a result of the petitioner's loss of tax revenues from the annexations in the August 10, 1980 through August 9, 1981 period, although the parties are, by agreement, paying a substantial portion of the disputed tax revenues into an escrow account pending final resolution of this litigation.

In early 1982, the respondent, City of Miamisburg informed the Montgomery County Auditor that it deemed itself entitled to all of the real, public utility, and tangible personal property taxes to be derived from its newly- annexed territories subsequent to November 7, 1980, the effective date of those annexations. The petitioner informed the Auditor that it deemed itself entitled to compensation under the provisions of Section 709.19 as a result of the massive annexations of its territory and consequent loss of tax revenue. Because of this impasse, the Montgomery County Auditor filed a Complaint on July 19, 1982, praying for an interpretation of Section 709.19 and a declaratory judgment.

A trial was held before Hon. William H. Wolff, Jr. on November 4, 1982. Judge Wolff entered his Decision on March 30, 1983, substantially adopting as those of the court petitioner's Proposed Findings of Fact filed November 4, 1982. The court further adopted the following Conclusions of Law:

> 1) For purposes of O.R.C. Section 709.19, "township" does not include a municipal corporation, even though the municipal corporation is attached;

2) For purposes of O.R.C. Section 709.19, "taxes" includes township service district taxes;

3) O.R.C. Section 709.19 does not offend the Constitution of the United States or the State of Ohio;

4) The defendants, Cities of Miamisburg, West Carrollton, and Moraine, are liable to Miami Township in the amount stated in the Proposed Finding of Fact 5 filed November 4, 1982.

From that decision, dated March 30, 1983, the respondents, Cities of Miamisburg, West Carrollton, and Moraine appealed to the Courts of Appeals for the Second Appellate District, Montgomery County, Ohio, asserting, among other issues, that the trial court erred in holding that for purposes of Ohio Revised Code Section 709.19, "township" does not include a nondetached municipal corporation. Following the submission of briefs and oral argument of the case on October 14, 1983, the Court of Appeals rendered its Opinion on December 15, 1983. On December 27, 1983, the Montgomery County Court of Appeals filed a Final Entry of Judgment pursuant to said Opinion. The Court of Appeals ruled that the Miamisburg-West Carrollton first assignment of error was well taken, and held that the taxable value of the real, public utility and tangible personal property of an attached municipal corporation (but not that of a detached municipal corporation) must be included in the valuation base in determining whether the 15% threshold for triggering compensation under Section 709.19 has been reached. On the basis of such ruling, the Court of Appeals reversed and remanded this case to the Court of Common Pleas of Montgomery County, Ohio for further proceedings consistent with their Opinion.

From the Opinion and Final Entry of the Court of Appeals of Montgomery County, Ohio referred to above, the

petitioner, Board of Trustees, Miami Township filed its Notice of Appeal to the Supreme Court of Ohio. In its Memorandum In Support of Jurisdiction to the Ohio Supreme Court, the petitioner asserted that the holding of the Court of Appeals, that a "township" includes a nondetached municipal corporation but not a detached municipal corporation, was in contravention of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Ohio Supreme Court never addressed or entertained this issue. On April 4, 1984, the Ohio Supreme Court overruled Miami Township's Motion For An Order Directing The Court of Appeals to Certify Its Record. Subsequently, Miami Township filed a Motion for Rehearing. The Ohio Supreme Court denied this motion on May 9, 1984.

VI. REASON FOR GRANTING THE WRIT

The Second District Court of Appeals' holding that "township", for purposes of Ohio Rev. Code Ann. § 709.19 (Page Supp. 1983), includes a nondetached but not a detached municipal corporation defeats the intent and object of the statute, and denies the petitioner Equal Protection of the Laws guaranteed by the Fourteenth Amendment to the United States Constitution.

The essence of equal protection is that no one shall be denied the same protection of a law which is enjoyed by others similarly situated. *City of Chicago* v. *Sturges,* 222 U.S. 313 (1911); *Youngstown Sheet and Tube Co.* v. *Youngstown,* 91 Ohio App. 431, 49 Ohio Op. 31, 108 N.E.2d 57 (1951). The power of the state to make classifications is said to be of wide range and flexibility, provided always that the classification must be reasonable, not arbitrary. It must rest on some ground of

difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated are treated alike. *Youngstown Sheet & Tube, supra* at 437. Further, "equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886); *State* v. *Felton,* 77 Ohio St. 554, 84 N.E. 85 (1908); *Youngstown Sheet and Tube, supra* at 435. The differentiation between annexing municipal corporations based on whether they are detached or nondetached and the Appellate Courts' holding that, for purposes of Ohio Rev. Code Ann. §709.19 (A)(1), a township includes a nondetached municipal corporation, denies to townships and cities alike the uniform applicability of the remedial provisions of Section 709.19.

The petitioner is fully cognizant that it is not constitutionally entitled to compensation for the annexation of its tax-rich territories. The petitioner is also mindful that such entitlement exists solely at the discretion of the State, and that the State, at its pleasure, may modify or withdraw all of its powers, or may take, without compensation, all of its property. *Hunter* v. *Pittsburgh,* 207 U.S. 161 (1907). Nevertheless, the Ohio Legislature, evidencing a sincere effort to preserve townships as a viable form of local government, thought it wise to grant townships the right to receive compensation in the case of massive municipal annexations of township territory. This right having been granted by the proper legislative body of Ohio, cannot now be judicially denied by drawing lines inconsistent with equal protection.

The United States Supreme Court has consistently taken the position that once a right is statutorily granted, lines cannot be judicially drawn, with respect to that right, which are inconsistent with equal protection. This principle of law applies even when the statutory right is not mandated

by the Federal Constitution. In the context of school district voting issues, the Court held that "where a state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, it must be determined whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969). The Court further held that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Kramer* v. *Union Free School District, supra,* 395 U.S. at 629, *quoting Harper* v. *Bd. of Elections,* 383 U.S. 663, 665 (1966). *See also Cipriano* v. *City of Houma,* 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski,* 339 U.S. 204 (1970), (applying the same rule to voting on revenue bond issues).

The general rule that a right once statutorily granted, even though not constitutionally mandated, cannot then be denied in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, has also been applied in the context of the Due Process Clause of the Fourteenth Amendment. In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), the Court held that "welfare benefits are a matter of statutory entitlement for persons qualified to receive them. Their determination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are a 'privilege' and not a 'right'." *Goldberg* v. *Kelly, supra,* 397 U.S. at 262. *See also Fuentes* v. *Shevin,* 407 U.S. 67 (1972). The judicial interpretation given to Section 709.19 by the Second District Court of Appeals is violative of this well established princi-

ple. The Second District Court of Appeals differentiated between detached and nondetached municipal corporations. Such a judicial distinction creates two violations of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. First, the petitioner, which was primarily annexed by a nondetached municipal corporation, the City of Miamisburg, is being treated differently than a similarly situated Township being annexed by a detached municipal corporation. Second, the dissimilar treatment of detached and nondetached municipal corporations has a direct impact upon and defeats the statutory entitlement due the petitioner and all similarly situated townships. The undisputed purpose and objective of Section 709.19 was to compensate townships for tax revenue lost due to massive annexations. This is evidenced by the fact that the statute is not activated unless the annexing body annexes at least 15% of the total taxable value of the township. It is the petitioner's contention that the 15% threshold, for purposes of Section 709.19, is reached whenever the taxable value of the annexed territory exceeds 15% of the total taxable value of the unincorporated area of the township—the area eligible for annexation. This is the only interpretation of Section 709.19 which guarantees the petitioner, and all townships similarly situated, equal protection of the laws which is guaranteed by the Fourteenth Amendment to the United States Constitution.

The petitioner, as a result of the Court of Appeals' decision, is being treated dissimilarly, under the compensation scheme of Section 709.19, based upon a distinction drawn between types of municipal corporations which is nowhere present in the legislative scheme. All but a minuscule part of the petitioner's tax revenue was lost as a result of the annexations by the respondent, City of Miamisburg, a nondetached municipal corporation. This is *precisely* the type

of tax loss which the legislature sought to minimize in enacting Section 709.19. Tax revenue was also lost as a result of identical annexations by the respondents, Cities of Moraine and West Carrollton, which are detached municipal corporations. The result of the distinction drawn by the Appellate Court creates the anomalous situation whereby cities such a Moraine and West Carrollton but not cities such as Miamisburg, must compensate annexed townships under the provisions of Section 709.19, in the aftermath of otherwise identical annexations. Conversely, townships which are similarly situated with the petitioner, will be given dissimilar treatment under Section 709.19, depending upon whether the annexations, which are otherwise identical, are performed by a detached or nondetached municipal corporation.

Not only does the Court of Appeals' interpretation of Section 709.19 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, but it also, defeats the entire objective of the legislaion. The United States Supreme Court has repeatedly held that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. *Reed* v. *Reed,* 404 U.S. 71, 76 (1971).

This principle of equal protection law has been developed and applied in a variety of contexts. In *Craig* v. *Boren,* 429 U.S. 190 (1976), the Court struck down an Oklahoma statute which prohibited the sale of "non-intoxicating" 3.2% beer to males under the age of 21 and to females under the age of 18. Citing the Court's decision in *Reed,* the Court held that to withstand constitutional challenge, based upon the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution, previous cases have established that classifications must serve important governmental objectives and must be substantially related to those objectives. *Craig* v. *Boren, supra,* 429 U.S. at 197. The Court concluded that the "appellees' statistics . . . cannot support the conclusion that the gender based distinction closely serves to achieve the stated objective and therefore the distinction cannot under *Reed* withstand equal protection challenge." *Id.* at 200.

The standard of judicial review developed in *Reed, supra,* was also employed to defeat a Tennessee statute which required residents to reside in the state for one year and in the county for three months as prerequisites for registration to vote. In *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), the Court held that "whether we look to the benefit withheld by the classification . . ., or to the basis for the classification . . . we conclude that the State must show a substantial and compelling reason for imposing durational residence requirements." *Dunn* v. *Blumstein, supra,* 405 U.S. at 335. The Court went on to reiterate that it is their duty in these voting cases to "determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 337.

The same standard of judicial review has also been applied in the context of workers' compensation statutes. The United States Supreme Court used the rationale employed in *Reed* to defeat a Louisiana workman's compensation law which compensated "unacknowledged illegitimate children" of the deceased only if there was not enough surviving dependents . . . to exhaust the maximum benefits." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972). The Louisiana law

defined children to include only legitimate children, stepchildren, posthumous children, adopted children, and acknowledged illegitimate children. In striking down the Louisiana law, the Court held that the denial of equal recovery rights to dependent unacknowledged illegitimate children violates the Equal Protection Clause of the Fourteenth Amendment. "The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workman's compensation statutes commendably serve." *Weber* v. *Aetna Casualty & Surety Co., supra,* 406 U.S. at 175.

This standard of judicial review was also utilized to defeat a Chicago, Illinois ordinance which prohibited all picketing within 150 feet of a school, except peaceful picketing of any school involved in a labor dispute. In *Police Dep't of Chicago* v. *Mosley,* 408 U.S. 92 (1972), the Court held that "[a]s in *all equal protection cases,* . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Police Dep't of Chicago* v. *Mosley, supra,* 408 U.S. at 95. (emphasis added). The Court further held that although the city certainly has a substantial interest in stopping picketing which disrupts a school, Chicago's ordinance, by discriminating against other forms of peaceful picketing, does not advance this objective in a manner consistent with the command of the Equal Protection Clause *Id.* at 99. The standard of judicial review developed in *Reed* v. *Reed, supra,* and subsequent cases, is applicable to, and should be utilized by this Court to review the Appellate Court's decision in this litigation.

The invidious classifications involved in this case — townships annexed by a nondetached municipal corpora-

tion versus townships annexed by a detached municipal corporation, and the differentiation between detached and nondetached municipal corporations for compensation purposes – are by-products of judicial activism. The decision of the Court of Appeals created a classification which is not evidenced by any part of the text or legislative history of Section 709.19. It is not the proper role of an appellate court to override legislative intent, thereby elevating itself to the position of a "super-legislature."

The internal construction of the statute supports the conclusion that the statute was not intended to discriminate in its applicability based on whether the annexing municipal corporation is "detached" or "nondetached" from the township in which it is geographically located. The preamble of Section 709.19 states that it is being enacted "to require an *annexing municipal corporation* to make payments under certain conditions to the township affected by the anexation . . ." (emphasis added). The preamble, as does the rest of the statute, speaks only in terms of *municipal corporations* making payments to township affected by the annexation . . ." (emphasis added). The statute does not qualify the requirement of such payments or change the threshold for making such payments based on whether the annexing municipal corporation is detached or nondetached.

Section 709.19 (A) (1) defines "Annexation Period" as "a period . . . during which *one or more* municipal corporations *annex* territory of a township that includes at least 15% but less than 100% of the total taxable value of the real, public utility and tangible personal property subject to taxation in that township in the base year." (emphasis added). This section is only concerned with annexation by one or more municipal corporations, making no dis-

tinction between detached and nondetached municipal corporations. In addition, this section becomes operative upon any annexation which meets the 15% threshold. It is physically and logically impossible for a municipal corporation to annex territory which is already within that municipal corporation. As the verb in the sentence is "annex," and its direct object is "territory of a township", the only logical construction is that the territory of a township being referred to is that which is capable of annexation – the unincorporated territory.

The specific percentage range of "at least 15% but less than 100% . . .", as contained in subsection (A)(1), brings further support to the petitioner's interpretation. Annexation of 85%, 95%, or 99% of a township's tax base quite clearly falls within the applicable range of the statute. Yet it would be impossible under the respondent's theory for an annexation of 85%, 95%, or 99% to take place where a municipal corporation, or significant portion thereof, is already deemed to be a part of the township under Section 709.19. However, where a municipal corporation remains part of the territorial township, it would still be possible, under the petitioner's theory, for a municipal corporation to annex a percentage approaching 100% of the unincorporated tax base of the township. The phrase "at least 15%, but less than 100%" then makes sense.

Finally, deposition testimony of the primary sponsors of Senate Bill 138, Senators Kenneth R. Cox and Charles J. Curran, directly supports the petitioner's contention that only the unincorporated territory of a township was intended to be included when determining whether the 15% threshold of Section 709.19(A)(1) had been reached. No evidence exists that suggests that the legislature gave any consideration whatsoever to the technical distinction

between a "detached" municipal corporation and a "non-detached" municipal corporation. This distinction, for purposes of Section 709.19 was a judicial fiat, and an impermissible intrusion into a legislative prerogative.

Employing the standard of judicial review developed in *Reed* v. *Reed, supra,* and subsequent cases, it is evident that the classification imposed by the Court of Appeals violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because it does not bear a fair and substantial relationship to the object of the legislation.

It is the undisputed objective of Section 709.19 to provide compensation to townships for the devastating loss of tax revenue due to massive annexations. The statute was meant to provide townships with an adjustment period after significant municipal annexation of its tax-rich territory. The objectives of Section 709.19 are not, in any manner whatsoever, furthered by distinguishing between types of annexing bodies. The judicially created classification not only lacks a "fair and substantial relation to the object of the legislation," but it also works to defeat the objectives of the legislation. Regardless of whether the annexing municipal corporation was "detached" or "non-detached" from the petitioner, the petitioner, according to the undisputed testimony at trial, has suffiered a loss of approximately 22.4% of its annual tax revenues, while the cost of providing township services following the annexations has declined only one-tenth of one per cent. With the minor exception of .18 mills of "inside millage", the annexations of the petitioner's territory resulted in a loss of all of the tax revenue it formerly derived from these tax-rich territories. It is clear that the judicially created classification does not bear a fair and substantial relation to the

objectives of Section 709.19; therefore, the interpretation given Section 709.19 by the Court of Appeals must be overruled as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

VII. CONCLUSION

Recognizing the inherent injustices and devastating effects of certain municipal annexations, the Ohio Legislature granted townships the right to receive compensation for tax revenue lost to annexations. Although this right is not mandated by the United States Constitution, the Foureenth Amendment to the United States Constitution prohibits denial of a statutorily granted right by means which are inconsistent with the Equal Protection Clause of the same amendment. The decision of the Second District Court of Appeals for Montgomery County, Ohio has violated this well established principle. The decision of the Court of Appeals intrudes deeply into an area of legislative concern, and denies the petitioner its statutory entitlement by a means inconsistent with the mandate of the Equal Protection Clause of the Fourteenth Amendment.

Likewise, the Court of Appeals' decision creates an interpretation of Section 709.19 which does not have a fair and substantial relation to the objectives of the legislation. In fact, the judicial interpretation of Section 709.19 works to deny compensation in precisely those situations where compensation is needed most, and where the legislature intended compensation to be given. A judicial interpretation which creates a classification that does not bear a fair and substantial relation to the objectives of the legislation cannot survive an equal protection challenge and must be overruled.

For these compelling reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals of Montgomery County, Ohio, dated December 15, 1983

IN THE
COURT OF APPEALS
OF MONTGOMERY COUNTY, OHIO

CASE NO. CA 8289

ROBERT L. RODERER,
AUDITOR, MONTGOMERY COUNTY
Plaintiff-Appellee

vs.

BOARD OF TRUSTEES,
MIAMI TOWNSHIP
Defendant-Appellee

CITY OF MORAINE
Defendant-Appellant

CITIES OF MIAMISBURG
AND WEST CARROLLTON
Defendants-Appellants

(Appeal from Common Pleas Court
Case No. 82-2042)

OPINION

Rendered on the 15th day of December, 1983

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ZIEGEL, J. (By Assignment)

During the period from October 7, 1980 to July 9, 1981, the dimensions of Miami Township, Montgomery County, Ohio were reduced by annexations by neighboring cities as follows:

a. October 7, 1980, City of Miamisburg, 342.304 acres.

b. October 7, 1980, City of Miamisburg, 276.855 acres.

c. June 23, 1981, City of West Carrollton, 854.617 acres.

d. August 14, 1980, City of Moraine, 80.8 acres.

e. July 9, 1981, City of Moraine, 9.7 acres.

Plaintiff, the Auditor of Montgomery County, Ohio, recognizing that he might be charged by law, under R.C. 709.19 (H), to issue warrants to compensate Miami Township for loss of revenues occasioned by its loss of territory under the general provisions of R.C. 709.19, being unable to establish an agreement between the township and the cities concerned, and being doubtful as to the construction to be placed upon R.C. 709.19, brought this action for a declaratory judgment. The township and each of the above named cities were named as parties defendant. After an extensive hearing, and at the end of a well written opinion, the trial court reached the following conclusions of law, pertinent to this appeal:

> 1. For purposes of R.C. 709.19, "township" does not include a municipal corporation, even though the municipal corporation is attached;
>
> 2. For purposes of R.C. 709.19, "taxes" includes township service district taxes;
>
> 3. R.C. 709.19 does not offend the Constitution of United States or the State of Ohio.

An appeal from this decision was duly perfected by the City of Moraine, and the Cities of Miamisburg and West Carrollton. Moraine assigns error as follows:

> 1. The trial court committed error prejudicial to said defendant-appellant in holding that Section 709.19 of the Revised Codes does not constitute an impermissible intrusion upon the City of Moraine's powers of local self government in violation of Sections 3 and 7 of Article XVIII of the Ohio Constitution.
>
> 2. The trial court committed error prejudicial to said defendant-appellant in holding that the language in Section 709.19 of the Revised Code is not so vague and uncertain in its meaning as to render the statute null and void.

Miamisburg and West Carrollton assert the following assignments of error:

> 1. The trial court erred in holding that the term "township" in Section 709.19 of the Ohio Revised Code included only the unincorporated areas of the township.
>
> 2. The trial court erred in holding that the phrase "taxes charged by a township" included all taxes charged by police districts, fire districts, and waste disposal districts created within that township.

Those parts of R.C. 709.19 pertinent to this appeal are:

> (A) As used in this section:
>
> (1) "Annexation period" means a period of one, two or three consecutive twelve-month periods, whichever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of a total taxable value of the real, public utility, and tangible personal property subject to taxation in that township. . .
>
> . . .
>
> (3) "Taxes" mean the real and public utility property taxes charged by a township in the base year. . .
>
> (4) "Township taxes in the annexed territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period. . .

With the exception of Moraine's first assignment of error, each of the aforementioned assignments of error deals with a construction of the language of R.C. 709.19. In its first assignment of error, Moraine contends that since R.C.

709.19 does not apply until after the annexation by a municipality of township territory takes place, it constitutes an impermissible intrusion on the home rule powers granted to municipalities by Sections 3 and 7, Article XVIII of the Ohio Constitution, in that during the waiting period of up to thirty six months set forth in R.C. 709.19(A)(1), the municipality is hampered in carrying out normal planning functions incident to its responsibility to provide funding for local government operations. Moraine concedes that annexation and detachment procedures are matters of "state-wide" concern, *Beechwood* v. *Board of Elections* (1958), 176 Ohio St. 369, but argue that since the provisions of R.C. 709.19 do not apply until after an annexation takes place, the legislature exceeded the limitations placed upon it by the Home Rule Amendments. We disagree.

Since the legislature has authority to prescribe the mechanics of annexation, we hold that it also has the authority to delineate in advance of annexation those burdens which may be attendant upon such annexation. In this case, R.C. 709.19 was effective before any of the governing bodies of any of the municipalities concerned enacted annexation ordinances. Each of these bodies knew at the time that if the threshold of fifteen percent "of a total taxable value of the real, public utility, and tangible personal property subject to taxation" in Miami Township was reached, either by its own annexation or by the sum total of other annexations by other municipalities from the township, a tax sharing with the township would be required. The enactment of the annexation ordinances was voluntary, and was accomplished with full knowledge that any tax monies received from the annexed territory might be subject to a future sharing requirement with the township from which the territory was being annexed. Moraine concedes that the legislature could have constitutionally enacted a statute

which made a redistribution of tax revenues a condition precedent to annexation. We see no distinction in making such redistribution a condition subsequent if the fifteen percent threshold is reached. If any of these municipalities was unwilling to assume the burden of the known potential condition subsequent, the same could have been avoided by failing to enact the annexation ordinance.

Moraine's first assignment of error is not well taken.

The remaining assignments of error each deals with claimed errors of the trial court in construing R.C. 709.19. It is well settled that a court's duty in construing an act of the legislature is to determine legislative intent, and this is done primarily from the language in which the enactment is couched. 50 O. Jur. 2d 141, Statutes, Section 170. Where that language is ambiguous, however, the court, in determining construction, may consider other matters, among which are, as set forth in R.C. 1.49:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted.

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction.

(F) The administrative construction of the statute.

The trial court determined that the statute in question was indeed ambiguous. During the course of the hearing, certain testimony was offered and received to enable the court to resolve the ambiguity as set forth in R.C. 1.49. No error is assigned as to the admission or use of any of this testimony, and reference is made to it both in the trial

court's opinion and in the briefs of counsel. On the appellate level, however, we consider much, if not all, of this testimony to be incompetent or of little probative value. It must be remembered that "[t]he law as it is passed is the will of the majority of both houses; . . . and it is impossible to determine with certainty what contsruction was put upon an act by the members of the legislative body that passed it by resorting to the speeches of individual members thereof, since those who did not speak may not have agreed with those who did, and those who spoke may have differed from one another." 50 O. Jur. 2d 259, Statutes, Section 274. While there is some authority for considering the testimony of sponsors of legislation, 73 Am. Jur. 2d 380, Statutes, Section 177, we are unaware of any case law which makes the testimony of persons who testified before a legislative committee or who consulted with the sponsors of legislation probative. Accordingly, in passing upon the assignments of error, use of such questionable testimony, even though it may have been received in the trial court, will generally be ignored.

The problem involved in the Miamisburg-West Carrollton first assignment of error arises out of the fact that, different from the other two cities, Miamisburg has never availed itself of the privilege conferred by R.C. 503.07 to petition the Montgomery County Board of County Commissioners for a change of Miami Township boundary lines in order to make them identical with its own boundaries. The result is that Miamisburg is still a part of Miami Township. Accordingly, appellant cities contend that in order to determine whether the fifteen percent threshold of total taxable value set forth in R.C. 709.19(A)(1) has been reached, the taxable value of the real, public utility, and tangible personal property subject to taxation in the City of Miamisburg must be taken into consideration. Ap-

pellee Miami Township, however, argues that the word "township" as used in the statute only refers to unincorporated territory of the township, as determined by the trial court.

Statutorily, the word "township" has a clear meaning. A township is a creature of the board of county commissioners. R.C. 503.03. Upon the creation of a township, or its change or alteration, "[t]he board shall cause the boundaries of such township. . . to be recorded in a book to be kept for that purpose. . ." R.C. 503.04. When the petition of a municipal corporation for a change of township lines is granted, the board of county commissioners make the appropriate boundary changes, R.C. 503.07. Thus, the township includes municipalities within its geographic boundaries, unless resort is had by these municipalities to R.C. 503.07.

The "taxing authority" of a township, per R.C. 5705.01 (C), rests in its board of township trustees. And that taxing authority is co-extensive with its boundaries. Within the limits of its authority, the board of township trustees has authority to levy taxes on property within its boundaries, including the levy of taxes upon property within the corporate limits of a municipality such as Miamisburg that is geographically a part of the township. Indeed, at hearing, the President of the Board of Township Trustees of Miami Township acknowledged the receipt of tax income derived from property physically located within the corporate limits of the City of Miamisburg. That income will continue to the same extent as to annexed township territory after annexation. The potential loss occasioned by Miami Township to annexations by Miamisburg is, therefore, proportionately less than any loss which might be occasioned by Moraine or West Carrollton annexations of township territory.

What became R.C. 709.19 proceeded through the Ohio General Assembly as Amended Substitute Senate Bill 138. The purpose of the legislation is set forth in the preamble to this Bill:

> "To enact section 709.19 of the Revised Code to require an annexing municipality to make payments under certain conditions to the township affected by the annexation. . ."

The "affect" upon Miami Township is clearly different from a Miamisburg annexation and a Moraine or West Carrollton annexation. The property in the territory annexed by Miamisburg is still subject to township taxation. On the other hand, in the absence of the corrective measures provided by R.C. 709.19, the property in territory annexed by Moraine or West Carrollton, after annexation, would no longer provide any tax income to Miami Township. There is, therefore, contrary to appellee's argument, a recognizable distinction from the affect an annexation by Moraine and West Carrollton would have on Miami Township vis-a-vis an annexation by Miamisburg.

Appellee contends that the phrase in R.C. 709.19(A)(1) "annex territory of a township that includes at least fifteen per cent but less than one hundred per cent" requires a construction of the word "township" to mean only unincorporated territory since a municipality which is a part of the township could not conceivably annex its own territory. It could, however, annex "less than one hundred per cent", and "at least fifteen per cent", quantities sufficient to make the statute operative.

It is further argued that if "township" is construed to include an attached municipality rather than just the unincorporated territory of the township, this would make it possible for the attached municipality to annex more land

than a detached municipality before the fifteen per cent threshold was reached. Be that as it may, we perceive this to be a problem for the legislature, not for the courts, where there is a duty to construe a statute as it is, not as it ought to be.

All parties, and the trial court, agree that in its enactment of this statute, the legislature did not consider the attached/detached phenomenon, a conclusion they reached as a result of the testimony of the sponsors of the legislation. We reach the same conclusion on the basis of the language of the statute. It is not for the courts to add material to legislation which the general assembly did not consider.

Accordingly, we hold that the word "township" in R.C. 709.19 is not ambiguous; that township is a territorial concept as set forth in R.C. 503.04 and 503.07; and that the phrase "total taxable value of the real, public utility, and tangible personal property subject to taxation in that township" in R.C. 709.19(A)(1) includes that property located within the corporate limits of Miamisburg, an attached city.

The first assignment of error of Miamisburg and West Carrollton is therefore held to be well taken.

The Miamisburg-West Carrollton second assignment of error involves the construction of R.C. 709.19(A)(3) and (4), and requires that the meaning of " 'taxes' . . . charged by a township . . ." and " 'township taxes in the annexed territory' " be determined. These appellants contend that these phrases limit those taxes to those levied by the township itself, and excludes any such taxes as might be levied by township service districts. Appellee urges, and the trial court so held, that taxes "charged by a township" refers not only to those taxes emanating from the township but also to those taxes derived from its service districts.

Various sections in R.C. Chapter 505 recognize a town-

ship's duty to provide certain essential services to its citizens. The board of township trustees may provide these services either through its own efforts or through the creation of service districts. These service districts have their own taxing powers, separate and apart from that of the township itself. Evidence introduced at the hearing established that the township board of Miami Township had indeed created within its territorial limits certain service districts and that a certain tax rate is applied solely to the operation of these service districts, all of which testimony is pertinent to this assignment of error.

There was also testimony concerning the specifics of the Miami Township service districts, the extent thereof (unincorporated areas), and the manner in which the board of township trustees administered the various service districts. (The statutes authorizing the creation of service districts each makes the board of trustees of the township the board of trustees of the service district.) We consider this evidence immaterial to our review. The assignment of error does not challenge the manner in which the trial court applied the statute to Miami Township, but rather complains about the construction of the statute generally. R.C. 709.19 was not enacted solely to remedy a situation created by municipal annexations of Miami Township, Montgomery County, Ohio territory, but rather was enacted, as is constitutionally required, for general application throughout the state.

Again, we observe that there is nothing in R.C. 709.19 which in any way refers to service districts; and it is conceivable that, similar to the situation referred to supra in our consideration of R.C. 709.19(A)(1), the legislature was unaware of any township/service district problem when it enacted R.C. 709.19(A)(3) and (4). As noted in the preamble to Am. Sub. Senate Bill 138, however, the legis-

lature was aware of the effect annexations of township territory by municipal corporations would have on the subject township, and on its ability to provide essential services to its citizens.

The legislature also recognized the need to provide these services when it enacted the various sections of R.C. Chapter 505, wherein the means of financing and administering them were set forth. Whether the board of township trustees elected to provide these services itself or to set up service districts, that board still had the duty to see that the service needs of its citizens were met. In either case, the same board made necessary decisions, the principal difference being in the methods of funding and accounting. It is inconceivable that the legislature by using the language in R.C. 709.19(A)(3) "charged by a township" intended to deprive the township which had elected to set up service districts of funds for services to its citizens which otherwise would have been available to it had it determined to provide those services itself rather than through service districts.

Accordingly, we hold that the trial court was correct in finding that "(F)or purpose of R.C. 709.19, 'taxes' includes township service district taxes." The Miamisburg-West Carrollton second assignment of error is thereby overruled.

Lastly, we comment briefly on Moraine's second assignment of error. Having been able to reach conclusions relative to the meaning of "township" and "taxes charged by a township" as used in R.C. 709.19, we cannot say that these terms are so vague and uncertain as to render the statute null and void.

Having determined that the Miamisburg-West Carrollton first assignment of error is well taken, this case will be reversed and remanded to the Court of Common Pleas

of Montgomery County, Ohio, for further proceedings consistent with this opinion.

• • •

BROGAN, P.J. and KERNS, J. concur.

(Judge Donald Ziegel, Retired from the Common Pleas Court of Preble County, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies to:

Michael Russell
Irvin G. Bieser
Philip B. Herron
William D. Forbes
Judge William Wolff, Jr.

APPENDIX B

Final Entry of the Court of Appeals of Montgomery County, Ohio, pursuant to the Opinion of December 15, 1983

IN THE COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

CASE NO. 8289

ROBERT L. RODERER, Auditor
of Montgomery County, Ohio
Plaintiff-Appellee

vs.

BOARD OF TRUSTEES, MIAMI TOWNSHIP
Defendant-Appellee

and

THE CITY OF MIAMISBURG, et al.
Defendants-Appellants

FINAL ENTRY

Pursuant to the opinion of this court rendered on the 15th day of December, 1983 the judgment of the trial court is reversed and remanded to that court for further proceedings consistent with the opinion.

/s/ JAMES A. BROGAN
JAMES A. BROGAN, Presiding Judge

/s/ JOSEPH D. KERNS
JOSEPH D. KERNS, Judge

/s/ DONALD L. ZIEGEL
DONALD L. ZIEGEL, Judge
(By Assignment)

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APPENDIX C

Decision and Entry on Application for Reconsideration Rendered on the 14th day of March, 1984

CASE NO. CA 8289

ROBERT RODERER, AUDITOR
Plaintiff-Appellee

vs.

BOARD OF TRUSTEES, MIAMI TOWNSHIP
Defendant-Appellee

CITY OF MORAINE
Defendant-Appellant

CITIES OF MIAMISBURG
AND WEST CARROLLTON
Defendants-Appellants

DECISION AND ENTRY ON APPLICATION FOR RECONSIDERATION
Rendered on the 14th day of March, 1984

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Attorney for Defendants-Appellants, Cities of Miamisburg and West Carrollton

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PER CURIAM:

In this motion for reconsideration, Miami Township seeks to have this court reverse its conclusion that "the phrase 'total taxable value of the real, public utility, and tangible personal property subject to taxation in that township' in R.C. 709.19(A)(1) includes that property located within the corporate limits of Miamisburg, an attached city." We reasoned that since the general assembly did not otherwise define the word "township" in the enactment of the statute, "township" included the incorporated territory of a municipality which had not availed itself of the privilege of detaching itself from the township pursuant to R.C. 503.07, and that if the general assembly had meant the word "township" to exclude the territory of such incorporated municipality, it should have so stated. We now affirm that position, but since in this motion Miami Township has questioned some of the language we used in our opinion, some clarifying comment is deemed appropriate.

Miami Township contends that we erred in stating that "(T)he taxing authority (of a township) is co-extensive with its boundaries." In making this complaint, Miami Township neglected to consider the next sentence of our opinion: "Within the limits of its authority, the Board of Township Trustees has authority to levy taxes on property within its boundaries, including the levy of taxes upon property

within the corporate limits of a municipality such as Miamisburg that is geographically a part of the township." We did not state, and did not hold, that Miami Township had the same authority to tax incorporated attached territory as it has to tax unincorporated territory, but we did recognize that the township, "within the limits of its authority", has some right of taxation as to incorporated territory. In its brief, Miami Township admits that it receives inside millage of .18 mill from taxation of property within the corporate limits of Miamisburg.

To that extent, at least, the "real, public utility, and tangible personal property" located within the corporate limits of the City of Miamisburg is "subject to taxation in that (Miami) township." R.C. 709.19(A)(1) does not make any distinction as to the rate of taxation to be applied to such property located within the corporate limits of Miamisburg that is subject to township taxation.

Miami Township further argues that we erred in stating that "(I)ncome will continue to the same extent as to the annexed territory after annexation." That quote in the Township's motion is incomplete. The full sentence reads: "*That* income will continue to the same extent as to the annexed township territory after annexation." The sentence in question followed immediately after the sentence quoted above which begins "(W)ithin the limits of its authority, etc." We did not state that Miami Township would receive the same income from territory annexed by Miamisburg after the annexation as it did before the annexation. In the case of an attached municipality, however, the township does not receive some income from the same tax base after as well as before annexation.

Lastly, Miami Township submits that we erred in stating that "(T)he property in the territory annexed by Miamis-

burg is still subject to township taxation." By such sentence, we do not state that Miami Township has the same right of taxation over territory annexed by Miamisburg after such annexation as it did before such annexation. As has been pointed out, the question is not as to comparative rates of taxation, but rather as to whether property in such annexed territory is subject to township taxation at all. We concluded that it was, and the illustration of the .18 mill inside millage taxation supports that conclusion. We note also that R.C. 505.37 (fire district) and R.C. 505.28 (waste disposal district) authorizes the board of township trustees under appropriate circumstances to levy taxation as to real, public utility, and tangible personal property located within the corporate limits of an attached municipality.

Miami Township's motion for reconsideration is accordingly overruled.

/s/ JAMES A. BROGAN, Presiding Judge
/s/ JOSEPH D. KERNS, Judge
/s/ DONALD L. ZIEGEL, Judge
(By Assignment)

Copies to:

Michael Russell
Irvin G. Bieser
Philip B. Herron
William D. Forbes

APPENDIX D

Decision, Findings Of Fact, Conclusions Of Law, and Final Judgment of the Common Pleas of Montgomery County, Ohio, dated November 4, 1982

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

Case No. 82-2042
(Judge William H. Wolff, Jr.)

ROBERT L. RODERER, AUDITOR
Plaintiff,

vs.

BOARD OF TRUSTEES, MIAMI TOWNSHIP
Defendant.

DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

I. INTRODUCTION

This litigation involves several interpretative and constitutional problems arising out of O.R.C. § 709.19.

One constitutional claim, by the City of Moraine, is that O.R.C. § 709.19 is so ambiguous that it defies interpretation and is void.

The other constitutional claim of Moraine is that § 709.19 is an impermissible legislative intrusion upon Moraine's power of self government.

The Cities of West Carrollton and Miamisburg claim § 709.19 violates constitutional guarantees of due process and equal protection, and is constitutionally impermissible retrospective legislation.

The problems of interpretation involve subsections (A)(1) and (A)(3):

> (A)(1) "Annexation period" means a period of one, two, or three consecutive twelve-month periods, whichever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility, and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.
>
> (A)(3) "Taxes" means the real and public utility property taxes charged by a township in the base year or, in an annexation under division (F) of this section, the real, public utility, and tangible personal property taxes that would have been charged by the township, if no annexation had occurred, in the year immediately preceding the year in which the payment is made, and payable after the reduction required by section 319.301 of the Revised Code, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

Under Ohio law, a municipal corporation, physically situated within the geographic boundaries of a township, may remain a part of that township or detach itself from the township. In this case, Miamisburg is attached to Miami Township and West Carrollton and Moraine are detached.

Section 709.19 provides that annexing cities only need

to pay compensation to the affected township when there occurs an "annexation period" – i.e. "a period of one, two, or three consecutive twelve month periods during which one or more municipal corporations annex territory of a township that includes at least fifteen percent but not less than one hundred percent of the total taxable value of the . . . property subject to taxation in that township". Therefore the question of whether, *for the purposes of § 709.19,* the attached municipal corporation is to be considered part of the township, i.e. should be included in the denominator used to determine whether the 15% threshold is reached, is critical. In this case, the 15% threshold is not reached if Miamisburg is included in the denominator; the 15% threshold is reached if only the unincorporated territory of Miami Township is included in the denominator. Here, Miamisburg and West Carrollton claim the denominator includes attached municipal corporations; Miami Township claims that it does not.

Because the compensation is a percentage of "township taxes in the annexed territory" [§ 709.19 (B)(C)(D)], the definition of "taxes" is crucial. Does "taxes charged by a township" (or "levied . . . by the township") mean only those taxes levied by the township itself, as the cities claim, or does "taxes" also include taxes levied by various township service districts – police, fire, waste disposal – as Miami Township claims?

Moraine's constitutional claim of vagueness is entwined in the interpretive questions and will be discussed in connection with those questions. The other constitutional problems will be discussed separately.

O.R.C. § 1.49 states:

> If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

Implicit in § 1.49 is the right and responsibility of the court to consider competent, probative evidence extraneous to the language of the statute to arrive at legislative intent.

It is the Court's task here to determine whether the statute is ambiguous with regard to the two interpretive problems. described above, and if so, to determine legislative intent if that can be done within the framework of § 1.49 on the competent, probative evidence before the Court.

II. THE MEANING OF "TOWNSHIP" IN O.R.C. § 709.19

Going to the first interpretive problem – whether the attached municipality is part of the township for § 709.19 purposes and is to be included in the denominator – the Court is satisfied from the evidence and rules of construction that the legislature intended that "township" exclude the attached city and that only the unincorporated territory of a township be included in the denominator.

The cities of Miamisburg and West Carrollton must be credited with a plausible argument to the contrary. If the

15% in § 709.19(A)(1) is of "the total taxable value of the. . . property . . . in that township", and an attached municipal corporation is part of the township, and "words . . . that have acquired a technical or particular meaning . . . shall be construed accordingly" (O.R.C. § 1.42), these cities can reasonably urge the court to conclude that the legislature considered the attached municipal corporation should be included in the denominator.

However, § 1.42 must be read in *pari materia* with § 1.49, if the word "township" is found to be ambiguous.

Although Miamisburg and West Carrollton claim the word "township" is not ambiguous, the Court disagrees.

To be sure, *Halsey* v. *Ward,* 17 O.S. 544 (1867) states that township territory within city limits does not cease to be township territory. Furthermore, O.R.C. § 503.07 provides an elective procedure by which a city may withdraw or detach from a township (which Miamisburg has not elected to do). Section 503.09 provides freehold electors of the unincorporated territory of a township with a similar procedure for ousting a city within the township boundaries.

Nevertheless, the fact that "township" has the technical meaning which Miamisburg and West Carrollton ascribe to it does not mean that "township", *as used in § 709.19,* is unambiguous.

Paragraph 1 of the Auditor's complaint for declaratory judgment indicates the Auditor thinks the 15% threshold has been reached but that agreement cannot be reached among the interested parties as to *whether* compensation should be paid because 15% is not reached if the denominator includes the incorporated area of the township.

James Battagaglia, the Assistant Controller for the Auditor, testified to the inability of the Auditor to determine the

meaning of "township" in § 709.19. (Transcript p. 16; also pp. 8, 34-35).

Moraine contends in its Pretrial Brief of October 27, 1982, that the word "township" — having both "technical" and "popular" meanings — is so hopelessly ambiguous that the legislation is unconstitutional. See p. 7.

Certainly the testimony of Senators Cox and Curran, the sponsors of § 709.19, that they intended "township" to mean only unincorporated territory, when contrasted with the technical meaning of "township", points up the ambiguity of the word "township". (Cox Deposition transcript 24, 27 and Deposition Ex. 5; Curran Deposition transcript 6, 27, 29).

Conceding that "township" technically includes attached municipal corporations, certain township powers are nevertheless restricted by law to the unincorporated area. Examples are the township police district (O.R.C. § 505.48) and township zoning powers (O.R.C. § 519.02 et seq.).

Finally, there is the popular meaning of township described by Moraine: the unincorporated area. Certainly the popular meaning conforms with the evidence in this case that the governmental operations of the City of Miamisburg and the governmental operations of the unincorporated area of Miami Township are separate. (Omietanski Transcript p. 77, 89).

For all of these reasons, the Court finds the word "township" to be ambiguous as it appears in § 709.19. See Black's Law Dictionary (5th Ed.) at 73; Webster's New Twentieth Century Dictionary (2nd. Ed. 1978) at 56.

Although the parties disagree as to the extent to which the Court can consider the deposition testimony of Senators Cox and Curran, and Alfred Schrader[1], there seems

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[1] The Court has limited its consideration of these depositions to the

to be no quarrel with the fact – testified to be those witnesses – that the legislature never discussed the "attached/detached" phenomenon and its effect upon proposed § 709.19. The statute clearly makes no mention of the problem nor distinction between attached or detached municipal corporations. Section 709.19 simply mentions "municipal corporations".

In determining that "township" means only the unincorporated area, the Court has considered the consequences of the Miamisburg - West Carrollton construction. Section 1.49(E).

O.R.C. § 503.07 provides for detachment by a city from a township. Whether to detach is up to the city. In this case, Miamisburg has not chosen to detach; West Carrollton has.

It does not take a computer model to demonstrate that whether the 15% threshold is met – by a single or several annexations – will depend in many cases upon whether an annexing municipality is part of the denominator used to determine the percentage. Certainly, the detached city cannot be part of the denominator, but Miamisburg and West Carrollton claim an attached city should be. The legislature could not have intended that whether the 15% threshold is reached depends on whether the city is attached or detached.

If such a construction were intended, annexing municipalities could be subject to differing treatment depending on whether they were attached or detached. The attached city could always annex more than a detached city without reaching the 15% threshold because it would increase the

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object sought to be attained, and the circumstances under which the statute was enacted. O.R.C. § 1.49(A)(B). These depositions are also evidence of the ambiguity of "township" and "taxes", as used in § 709.19.

denominator, as the detached city could not. Assuming the same annexation from the same unincorporated territory, the percent that can be taken without compensation will always be smaller where the annexing city is detached because it is not part of the denominator. The legislature cannot have intended that a detached city be penalized for having elected to detach itself from the township.

The language of subsection (A)(1) also militates against the cities' contention that the attached city is part of the denominator. A compensable annexation is "at least fifteen percent but less than one hundred percent". It is inconceivable that a city could annex 99.999% if the attached city is included in the denominator. Yet, such a percentage annexation is possible if the definition of "township" for the purposes of § 709.19 is construed as meaning only unincorporated territory.[2]

The conclusion that "township", i.e. the denominator, does not include the attached city is also borne out by the object sought to be attained by the legislation, the circumstances under which § 709.19 was enacted, and further consideration of the constructions advanced by the parties. See § 1.49 (A, B, E).

There is a remarkable dearth of *legislative* history. See § 1.49(C). Yet, we do know from the testimony of Senator Cox (Deposition transcript pp 5-7) and Alfred Schrader (Deposition transcript pp 7-10) that § 709.19 was inspired by legislative concern about annexations of tax rich unincorporated township territory. The preamble to Am. Sub. S. B. 138 (i.e. § 709.19) indicates the object of

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[2] While the Court recognizes that an annexation approaching 100% may entitle the remaining township to compensation well in excess of its actual needs, this possibility is not present here and is only noted in passing to apprise those interested in this legislation of another potential problem with it.

the legislation is "to require an annexing municipal corporation to make payments under certain conditions to the township affected by the annexation. . ." Defendants Miamisburg - West Carrollton Ex. B.

Compensation was sought by the bill's sponsors because annexations of tax rich territory by the City of Akron had left the affected township with substantially the same service requirements as before the annexation, but with a diminished tax base from which to finance these services.

To adapt the Miamisburg approach is to hold that the same tax loss may or may not be compensable, depending on whether the annexing city is detached or attached.

This construction works a twofold injustice. First, as previously stated, it penalizes a city that has elected to detach from the township because its annexation will reach 15% before an attached city's will. Secondly, it penalizes the township that has the misfortune of having portions of its territory annexed by an attached city rather than a detached city because the attached municipal corporation can annex more before 15% is reached than can the detached municipal corporation. The legislature cannot have intended either of these results.

The Court realizes that this case involves accumulated annexations by both attached and detached cities. The Court concedes that the foregoing discussion, for illustrative purposes, utilizes a single annexation by either a detached or attached city. The evidence in this case does indicate, however, that whether Miamisburg – an attached city – is considered part of Miami Township is, for percentage computation purposes, critical to the determinations sought by the Auditor.

The language of § 709.19 is consistent with an intent that "township" be confined to the unincorporated area of a township.

" 'Township taxes in the annexed territory' means the taxes against the property . . . in territory *annexed from* the township *to* a municipal corporation." § 709.19(A)(4).

The emphasized prepositions "from" and "to" suggest that the township and the municipal corporation are distinct entities for the purposes of this legislation, regardless of whether the city is attached.

"Taxes" are the medium of compensation under § 709.19. "Taxes" are defined at (A)(3) as the taxes "charged" or "levied" *by* a (the) township." Because the *bulk* of the taxes that are charged or levied *by* a township are against property in the unincorporated area of the township, it can reasonably be concluded that the legislature meant to restrict the word "township" in (A)(1) to the unincorporated area of the township. In other words, if township taxes can generally be levied only against property in the unincorporated area, then when the legislature used the word "township" in (A)(1), it must have meant unincorporated territory only.[3]

Finally, a failure to distinguish between the detached and attached municipal corporation indicates that the legislature intended that there is to be no overlap of the municipal corporation and township in the application of § 709.19.

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[3] This observation is based on practical considerations as well as legal restrictions upon township taxation outside the unincorporated area. The Akron annexations of Springfield township, which inspired § 709.19, did not involve annexation by an attached city. See Cox Deposition transcript pp. 24-25. The annexations here do involve an attached city and while Miami Township does theoretically have perhaps extensive taxation power over Miamisburg see O.R.C. § 5705.19 —Miami Township's service districts do not extend into Miamisburg and only .18 mills are collected within Miamisburg for the benefit of Miami Township. Township revenue, as a practical matter—, is derived, for the most part, from the unincorporated area, because the attached city as does Miamisburg — provides services through municipal service departments.

III. THE MEANING OF TAXES IN O.R.C. § 709.19

Having determined that "township" includes only unincorporated territory, we next turn to the second interpretive problem in the case: whether the medium of compensation — "taxes" — includes taxes levied by various township districts, or is limited to taxes levied by the township.

" 'Taxes' means the real and pubilc utility property taxes charged *by a township* . . . and the taxes levied . . . *by the township* against tangible personal property. 'Taxes' excludes taxes for the payment of debt charges." § 709.19 (A)(3). (Emphasis added).

The cities contend that beecause a township and a township district are separate legal entities, the legislation restricts compensation to those taxes that are strictly township taxes, and excludes those taxes levied by a township district.

While this is again a plausible contention, the Court rejects it after considering the interpretive factors at O.R.C. § 1.49 upon which evidence has been introduced.[4]

First of all, the reason a township decides to create districts is essentially political: citizens are more likely to approve a levy identified with a specific service district — police, fire, waste disposal, etc. — than a levy that is not specifically earmarked. See Schrader Deposition pp. 40-41, Omietanski pp. 75-76.

Giving consideration to the object sought to be attained

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[4] The medium of compensation is "taxes", defined in part by § 709.-19(A)(3) as "taxes charged by a township." The Court is satisfied that this phrase is ambiguous. The answers of Miami Township, Miamisburg and West Carrollton admit that the interested parties cannot agree as to how much should be paid if compensation is to be paid. Senators Cox and Curran testified that their intention was to include district taxes. (Cox Deposition transcript pp. 2., 44, 51, 85-86; Curran Deposition transcript pp. 9-10). See also Schrader Deposition transcript at 34. This conflicts with the cities interpretation of the phrase.

by § 709.19 and the consequences of the construction of "taxes" advanced by the cities [§ 1.49 (A), (E)], it is clear that the cities' construction of "taxes" goes a long way toward nullifying the salutary object of the legislation where the affected township has chosen to create service districts.

The Akron annexation that prompted § 709.19, and the annexations in this case, leave the affected townships with substantially the same service responsibilities, but with significantly less tax base from which to fiinance these continuing service obligations. See Omietanski p. 91.

This Court cannot conceive of the legislature's intending to deprive the affected township of otherwise payable compensation because that township has elected to provide services to its residents through service districts rather than directly.

The Court also finds significant that the township trustees are also the trustees of these service districts (O. R.C. § 5705.01 (A)(C); Omietanski p.79); that township and township service district business is conducted at a single meeting without adjourning strictly township business to work on strictly district business and vice versa (Omietanski pp. 79-87); that a police district cannot, by law, extend beyond the unincorporated territory O.R.C. § 505.48; that no Miami Township service district extends beyond the unincorporated territory of Miami Township (Cleary Deposition transcript pp. 30-31; Omietanski p. 77) and no Miamisburrg residents are taxed by these service districts (Cleary Deposition transcript p.38); and that the bulk of Miami Township's taxes come from the unincorporated area. Omietanski p. 113.

Furthermore, that the only specific exclusion from "taxes" in (A)(3) is "taxes for the payment of debt charges" is some indication (the legislature never considered this "township taxes/district taxes" problem) that

"taxes" is meant by the legislature to embrace service district taxes as well as those levied directly by the township.

Finally, that compensation to be paid is a percentage of "the township taxes in the annexed territory" [§ 709.19 (B) (C) (D)], defined as "the taxes against the . . . property . . . in territory annexed" § 709.19 (A)(4)] is an indication that the legislative concern was compensation for *all* taxes lost to the township – either directly or to its service districts.

Having determined the meaning of "township" and "taxes" as used in § 709.19, Moraine's constitutional claim of vagueness is rejected.

IV. CONSTITUTIONAL PROBLEMS

A. HOME RULE

Moraine does not contend that the state legislature may not regulate annexations. Moraine claims that § 709.19 is a constitutionally impermissible intrusion upon its home rule powers, granted by Article XVIII,, §§ 3 and 7, of the Ohio Constitution, because it regulates Moraine's use of its taxes after the annexation is complete.

That § 709.19 may regulate the use of municipal taxes after annexation does not necessarily make § 709.19 unconstitutionally intrusive.

If compensation of townships which have lost tax rich territory is a legitimate legislative concern, then the legislature should have power to fashion a mechanism for providing the compensation. A practicable, workable mechanism is payment to the affected township of the equivalent of the taxes which would have been collected by the township from the annexed territory had there been no annexation. Unquestionably, these compensation payments will

come from the municipality, including the annexed territory. However, the payout will come from an enlarged tax and bear a rough correspondence to the additional taxes the municipality realizes on account of the annexation.

Moraine suggests that had the legislature provided for redistribution of tax revenues as a condition precedent to the completion of a valid annexation, that this would pass constitutional scrutiny. Brief of October 27, 1981 at p. 12. Indeed, leaving the ultimate fate of the annexation in limbo for five, six, or seven years may have avoided the specific problem raised here by Moraine, but it no doubt would have created other difficulties.

Bearing in mind the words of the Supreme Court in *Cleveland Electric Illuminating Co.* v. *Painsville,* 15 O. S. 2d 125 (1968) at 129: ". . . even in the regulation of . . . local matters a municipality may not infringe on matters of general or statewide concern", the Court observes that even though § 709.19 provides for a post-annexation regulation of municipal taxes, what it really does is no more than regulate for a period of five to seven years a portion of those taxes by directing them back to the township that was deprived of them by the annexation. If annexation is a matter of legislative concern, an intrusion that goes no farther than to address that concern is constitutionally permissible.

The fact that there may be uncertainty about whether an annexation may comprise part of a 15% series of annexations on account of subsequent annexations is unfortunate, but inevitable. This uncertainty does not equal unconstitutionality.

B. DUE PROCESS

Miamisburg and West Carrollton claim that § 709.19 violates the due process clause of the United States Consti-

tution and the due course of law provision of the Ohio Constitution. These cities invoke the heroic "taxation without representation" call to arms. West Carrollton claims that because it is a detached city with a lower property tax rate than Miami Township, its residents who do not live in the annexed territory have had no voice in establishing the tax rate that will be the basis of compensation. Miamisburg makes the same argument as to township service district taxes although as an attached city, its residents have a voice on township (as distinguished from township district) taxes.

The Court rejects this due process/due course claim of unconstitutionality. This is not a taxation law; this is a compensation law. The state legislature has told municipal corporations that townships must be compensated for certain annexations. Section 709.19 was in effect before these annexations were finalized, and the city councils are presumed to have realized their cities' obligation under § 709.19 to pay compensation. The residents of these cities elected the council members so they cannot claim they were not represented in the decision making process that resulted in finalizing these annexations, with their resultant compensation obligations. Although the medium of payment is taxes, or the equivalent, the object is compensation. If the city were to purchase a fire truck to be paid for with tax revenues, the residents could not claim "taxation without representation" because they had no voice in fixing the price of the fire truck. They were represented by their elected council members in the decision to buy the truck. This situation is analogous.

C. EQUAL PROTECTION

The equal protection claim of unconstitutionality is based on two possible constructions of § 709.19: (1) that

the newly annexed residents pay municipal taxes at the higher township rate during the compensation period while the pre-annexation residents pay at the lower prevailing city rate, or (2) that all city residents – pre and post annexation – pay taxes at a uniform lower city rate, out of which revenues compensation payments are made to the affected township at the higher township rate. The cities claim the first scenario is constitutionally infirm because it creates two classes of taxpayers within the municipality; they claim the second scenario is infirm because it discriminates against city residents for the benefit of township residents.

There is nothing in § 709.19 (B, C, D) suggesting the first scenario is the manner in which § 709.19 will be implemented. If a city chooses to so implement § 709.19, it will be the city's equal protection problem, not the legislature's. Assuming the second scenario is the way § 709.19 will be implemented, the question is whether the classifications that will exist during the compensation period are reasonable. See *Beatty* v. *Akron City Hospital,* 67 O. S. 2d 483 (1981) at 492.

Here, the object of the legislation is compensation for tax rich territory, the annexation of which is not accompanied by a porportional [sic] reduction of the township's service obligation.

The payout is not in perpetuity but for a period of five to seven years.

The cities are not forced to annex these unincorporated areas, and clearly do so for their own benefit.

This legislation does not offend the equal protection provisions of the United States and Ohio Constitutions.

D. RETROSPECTIVE LEGISLATION

Finally, we reach the claim that §709.19 is impermissable retrospective legislation.

Section 709.19 became effective December 27, 1979, and by its terms applied to then pending annexations. See Defendants Maimisburg [sic] – West Carrollton Exhibit B. Section 3. According to the Stipulations filed September 30, 1982, the ordinances accepting the five annexations comprising the greater-than-15% aggregate were all enacted after the effective date of § 709.19. See Stipulations 3. The enactment of an ordinance is an exercise of legislative judgment. It presumes awareness of existing state law. The cities were not forced to enact these ordinances. Section 709.19 did not impose additional consequences upon something that was already accomplished. As to these annexations, § 709.19 was prospective rather than retrospective.

V. FINDINGS OF FACT

In accordance with these determinations and the evidence, the Court adopts as its own Miami Township's Proposed Findings of Fact of November 4, 1982, changing the first word in proposed finding 5 from "If" to "Because". See also initialed deletion and correction.

VI. CONCLUSIONS OF LAW

1) For purposes of O.R.C. § 709.19, "township" does not include a municipal corporation, even though the municipal corporation is attached;

2) For purposes of O.R.C. § 709.19, "taxes" includes township service district taxes;

3) O.R.C. § 709.19 does not offend the Constitution of the United States or the State of Ohio;

4) The defendants, Cities of Miamisburg, West Car-

rollton, and Moraine, are liable to Miami Township in the amounts stated in Proposed Finding of Fact 5 filed November 4, 1982:

VII. FINAL JUDGMENT

IT IS ORDERED THAT PLAINTIFF SHALL ISSUE WARRANTS TO MIAMI TOWNSHIP, PURSUANT TO O.R.C. § 709.19 (B) and (H), IN THE AMOUNTS STATED IN PROPOSED FINDING OF FACT 5 FILED NOVEMBER 4, 1982. COSTS TO CITIES OF MIAMISBURG, WEST CARROLLTON, AND MORAINE.

Copies of this Entry shall be sent to all parties listed below by ordinary mail on this date of filing.

APPROVED:

/s/ WILLIAM H. WOLFF, JR.
WILLIAM H. WOLFF, JR., JUDGE

MICHAEL RUSSELL, Assistant Prosecuting Attorney, Attorney for Plaintiff, Suite 300, 41 N. Perry Street, Dayton, Ohio 45402

IRVIN G. BIESER, Attorney for Defendant Board of Trustees, Miami Township, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402.

WILLIAM D. FORBES, Attorney for Defendants Cities of Miamisburg and West Carrollton, 101 N. First Street, Miamisburg, Ohio 45342

PHILIP B. HERRON, Attorney for Defendant City of Moraine, 2000 First National Plaza, Dayton, Ohio 45402

THOMAS ROBERTS, Bailiff

APPENDIX E

Petitioners Proposed Findings of Fact, adopted by reference in Judge Wolff's Opinion of November 4, 1982

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO

CASE NO. 82-2042
(Judge Wolff)

(Filed November 4, 1982)

ROBERT L. RODERER, Auditor
of Montgomery County, Ohio

Plaintiff

vs.

BOARD OF TRUSTEES
Miami Township, et al,

Defendant

DEFENDANT BOARD OF TRUSTEES, MIAMI TOWNSHIP'S PROPOSED FINDINGS OF FACT

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1. For the calendar year 1979 the tax rate charged by Miami Township is 7.61/9.15.

2. The "annexation period" may be any one, two or three year period during which the annexations subject to Section 709.19 take place. The "annexation period"

applicable to this case, as said annexation period is defined in Section 709.19(A)(1), is the period commencing August 10, 1980 and ending August 9, 1981. Each of the annexations of Miami Township territory described in paragraphs 3a, 3b, 3c, 3d, and 3e of the Stipulations took place within said annexation period.

3. Under Section 709.19(A)(3), the term "taxes" is defined as follows:

> ". . . the real and public utility property taxes charged by a township in the base year . . . and the taxes levied for such year by the township against tangible personal property. 'Taxes' excludes taxes for the payment of debt charges."

In the calendar year 1979, such amount was $1,288,865.83.

4. Under Section 709.19(A)(4), the term "township taxes in the annexed territory" is defined as follows:

> ". . . the Taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period"

In this case, the "township taxes in the annexed territory" are those taxes against the real, public utility, and tangible personal property subject to taxation in calendar year 1979 in that territory annexed from Miami Township to the Cities of Miamisburg, West Carrollton and Moraine during the period August 10, 1980 through August 9, 1981, inclusive, and it is stipulated that such amount is $289,534.83, plus personal property taxes on certain Route 741 businesses not included in the Miamisburg tax figures in #5 below, because of the Auditor's inability, to obtain such figures as of the trial date ("+").

Said total of $289,534.83 is calculated as follows:

Category	Valuation	Rate	Tax
Real Property	18,516,330.00	x .00761 =	140,909.27
Public Utility	16,092,520.00	x .00915 =	147,246.56
Tangible Personal	150,660.00+	x .00915 =	1379.00+
Total taxable value in annexed territory (sum of stipulations 13, 14 & 15)	$34,759,510.00+		$289,534.83+

5. If it is found that the Cities of Miamisburg, West Carrollton and Moraine have annexed territory of Miami Township that includes "at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility, and tangible personal property subject to taxation" in Miami Township in the year August 10, 1980 through August 9, 1981, (which is the applicable "annexation period" as such term is defined in Section 709.19 (A)(a) then the above-named municipal corporations shall be liable to pay Miami Township for a period of seven years, pursuant to Section 709.19 (B) and in accordance with the procedure set forth in Section 709.19(H)(1), the following compensation:

a.

1. Miamisburg: In the year August 10, 1981 through August 9, 1982, one hundred per cent (100%) of township taxes in the annexed territory ($285,496.89+).

2. Moraine: In the year August 10, 1981 through August 9, 1982, one hundred per cent (100%) of township taxes in the annexed territory ($2,976.88).

3. West Carrollton: In the year August 10, 1981 through August 9, 1982, one hundred per cent (100%) of township taxes in the annexed territory ($1,061.06).

b.

1. Miamisburg: In the year August 10, 1982 through August 9, 1983, one hundred per cent (100%) of township taxes in the annexed territory ($285,496.89+).

2. Moraine: In the year August 10, 1982 through August 9, 1983, one hundred per cent (100%) of township taxes in the annexed territory ($2,976.88).

3. West Carrollton: In the year August 10, 1982 through August 9, 1983, one hundred per cent (100%) of township taxes in the annexed territory ($1,061.06).

c.

1. Miamisburg: In the year August 10, 1983 through August 9, 1984, one hundred per cent (100%) of township taxes in the annexed territory. ($285,496.89+).

2. Moraine: In the year August 10, 1983 through August 9, 1984, one hundred per cent (100%) of township taxes in the annexed territory ($2,976.88).

3. West Carrollton: In the year August 10, 1983 through August 9, 1984, one hundred per cent (100%) of township taxes in the annexed territory ($1,061.06).

d.

1. Miamisburg: In the year July 10, 1984 through July 9, 1985, eighty per cent (80%) of the township taxes in the annexed territory. ($228,397.51+).

2. Moraine: In the year July 10, 1984 through July 9, 1985, eighty per cent (80%) of the township taxes in the annexed territory ($2,381.50).

3. West Carrollton: In the year July 10, 1984 through July 9, 1985, eighty per cent (80%)

of the township taxes in the annexed territory ($848.85).

e.

1. Miamisburg: In the year August 10, 1985 through August 9, 1986, sixty percent (60%) of the township taxes in the annexed territory ($171,298.13+).

2. Moraine: In the year August 10, 1985 through August 9, 1986, sixty per cent (60%) of the township taxes in the annexed territory ($1,786.13).

3. West Carrollton: In the year August 10, 1985 through August 9, 1986, sixty per cent (60%) of the township taxes in the annexed territory ($636.64).

f.

1. Miamisburg: In the year August 10, 1986 through August 9, 1987, forty per cent (40%) of the township taxes in the annexed territory ($114,198.75+).

2. Moraine: In the year August 10, 1986 through August 9, 1987, forty per cent (40%) of the township taxes in the annexed territory ($1,190.74).

3. West Carrollton: In the year August 10, 1986 through August 9, 1987, forty per cent (40%) of the township taxes in the annexed territory ($424.42).

g.

1. Miamisburg: In the year August 10, 1987 through August 9, 1988, twenty per cent (20%) of the township taxes in the annexed territory ($57,099.38+).

2. Moraine: In the year August 10, 1987 through August 9, 1988, twenty per cent (20%)

of the township taxes in the annexed territory ($595.38).

3. West Carrollton: In the year August 10, 1987 through August 9, 1988, twenty per cent (20%) of the township taxes in the annexed territory ($212.21).

/s/ IRVIN G. BIESER, JR.
Irvin G. Bieser, Jr., Trial Attorney
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Telephone: (513) 223-3277
Attorneys for Defendant,
Board of Trustees of Miami Township

APPENDIX F

Order of the Supreme Court of Ohio overruling Petitioner's Motion For An Order Directing The Court Of Appeals To Certify Its Record

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THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1984 TERM
)
City of Columbus.) To wit: April 4, 1984

No. 84-306

Robert L. Roderer, Auditor,
Appellee,

vs.

Board of Trustees, Miami Township,
Appellant;

City of Miamisburg et al.,
Appellees.

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR MONTGOMERY COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00 paid by Bieser, Greer & Landis

I, James Wm. Kelly, Clerk of the Supreme Court of

Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this ..... day of ..... 19....
..... Clerk
..... Deputy

APPENDIX G

Order of the Supreme Court of Ohio denying Petitioner's Motion for Rehearing

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THE SUPREME COURT OF OHIO
COLUMBUS

THE STATE OF OHIO — 1984 TERM
City of Columbus. — To Wit: May 9, 1984

Case No. 84-306

Robert L. Roderer, Auditor,

Appellee,

vs.

Board of Trustees, Miami Township et al.,

Appellants.

REHEARING

It is ordered by the court that rehearing is this case is denied.

I, JAMES WM. KELLY, Clerk of the Supreme Court of the State of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 9th day of May, 1984.

. . . . . Clerk.

By . . . . . Deputy.

APPENDIX H

Text of Ohio Rev. Code Ann. § 709.19 (Page Supp. 1983)

§ 709.19 [Payments to compensate township for lost tax revenues: authority to annex international airport.]

(A) As used in this section:

(1) "Annexation period" means a period of one, two, or three consecutive twelve-month periods, whichever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility, and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.

(2) "Base year" means the calendar year immediately preceding an annexation period.

(3) "Taxes" means the real and public utility property taxes charged by a township in the base year or, in an annexation under division (F) of this section, the real, public utility, and tangible personal property taxes that would have been charged by the township, if no annexation had occurred, in the year immediately preceding the year in which the payment is made, and payable after the reduction required by section 319.301 [319.30.1] of the Revised Code but prior to the reduction required by section 319.302[319.30.2] of the Revised Code, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

(4) "Township taxes in the annexed territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation

during an annexation period or, in an annexation under division (F) of this section, the taxes against the real, public utility, and tangible personal property that would have beeen subject to taxation in the annexed territory in the year immediately preceding the year in which the payment is to be made, if no annexation had occurred.

(5) "International airport" means any airport that is:

(a) Designated as an international airport or a landing rights airport by the United States secretary of the treasury;

(b) Owned and operated by a municipal corporation;

(c) An unincorporated area not contiguous to the municipal corporation that owns it.

(B) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twelve consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the seven years following the annexation period:

(1) In each of the first three years, one hundred per cent of the township taxes in the annexed territory;

(2) In the fourth year, eighty per cent of the township taxes in the annexed territory;

(3) In the fifth year, sixty per cent of the township taxes in the annexed territory;

(4) In the sixth year, forty per cent of the township taxes in the annexed territory;

(5) In the seventh year, twenty per cent of the township taxes in the annexed territory.

(C) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of thirteen to twenty-four

consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the six years following the annexation period:

(1) In each of the first two years, one hundred per cent of the township taxes in the annexed territory;

(2) In the third year, eighty per cent of the township taxes in the annexed territory;

(3) In the fourth year, sixty per cent of the township taxes in the annexed territory;

(4) In the fifth year, forty per cent of the township taxes in the annexed territory;

(5) In the sixth year, twenty per cent of the township taxes in the annexed territory.

(D) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twenty-five to thirty-six consecutive months, except as provided in division (G) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the five years following the annexation period:

(1) In the first year, one hundred per cent of the township taxes in the annexed territory;

(2) In the second year, eighty per cent of the township taxes in the annexed territory;

(3) In the third year, sixty per cent of the township taxes in the annexed territory;

(4) In the fourth year, forty per cent of the township taxes in the annexed territory;

(5) In the fifth year, twenty per cent of the township taxes in the annexed territory.

(E) If, pursuant to division (F) of this section, a munici-

pal corporation annexes an international airport that it owns, the municipal corporation shall pay the township one hundred per cent of the township taxes in the annexed territory that would have been due the township, if no annexation had occurred, for each of the twenty-five years following the annexation.

(F) (1) Notwithstanding any other provision of this chapter, a board of county commissioners may authorize a municipal corporation to annex an international airport that the municipal corporation owns. Unless a contract is entered into pursuant to division (F)(2) of this section, any municipal corporation that annexes an international airport under this division shall make payments to the township from which the international airport is annexed, in the manner provided in division (E) of this section. No territory annexed pursuant to this division shall be considered part of the municipal corporation for the purposes of subsequent annexation, except that the board of county commissioners may authorize subsequent annexation under this division if the board determines that such annexation is necessary to the continued operation of the international airport.

(2) The chief executive of a municipal corporation that annexes territory pursuant to this division may enter into a contract with the board of township trustees of the township that loses the territory whereby the township agrees to provide the annexed territory with police, fire, or other services it is authorized to provide in exchange for specified consideration as agreed upon by the board of township trustees and the chief executive. In no instance shall the consideration received by the township be less than the payments that would be required under division (F)(1) of this section if no contract were entered into.

(G) If after an annexation period for which payments

are being made or are to be made to a township by one or more municipal corporations under division (B), (C), or (D) of this section, the remainder of the unincorporated territory of the township is annexed to another municipal corporation or incorporates as a municipal corporation, the balance of the payments due the township under division (B), (C), or (D) of this section shall be made to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory.

No payment shall be made to a municipal corporation pursuant to this division unless the remainder of the unincorporated territory of the township referred to in this division constitutes at least fifty per cent of the area of the unincorporated area of the township prior to the annexation period.

(H) After consultation with the chief executive officer of the municipal corporation and the board of township trustees, the county auditor shall determine by which of the following methods the municipal corporations that annexed township territory shall pay the township the amounts prescribed in divisions (B) to (F) of this section, except that if the payments are made pursuant to division (G) of this section, they shall be made by the first method listed below:

(1) The county auditor shall issue a warrant semi-annually against the taxes charged and payable against real and public utility property located in the municipal corporation and the taxes levied against tangible personal property located in the municipal corporation, and the county treasurer shall distribute such amount to the township or, pursuant to division (G) of this section, to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory; or

(2) The county budget commission shall pay such amounts to the township from the amount apportioned to the municipal corporations from the undivided local government fund. The payment shall be over and above the amount apportioned to the township pursuant to section 5747.51 or 5747.53 of the Revised Code, and the apportionment of the municipal corporations shall be reduced by like amounts.

(I) Upon written notification to the county auditor and the chief executive officer of each municipal corporation that annexes township territory during an annexation period, a board of township trustees may decline to accept the payments required under divisions (B), (C), (D), and (F) of this section, and a municipal corporation may decline to accept the payments required under division (G) of this section.

A municipal corporation need not make any payment required by this section if its legislative authority enters into an agreement under section 709.191 [709.19.1] of the Revised Code.

HISTORY: 138 v S 138 (Eff 12-27-79); 138 v H 814 (Eff 10-6-80); 138 v H 1238 (Eff 12-19-80); 139 v H 19, Eff 2-2-82.

Not analogous to former RC § 709.19, repealed 133 v H 491. § 2. eff 11-21-69.

The provisions of § 2 of SB 138 (138 v—) read as follows:

SECTION 2. Petitions for annexation filed pursuant to Chapter 709. of the Revised Code that are pending on the effective date of this act shall be governed by the terms of this act.

APPENDIX I

Text of Ohio Senate Bill 138, Effective December 27, 1979

AM. SUB. SENATE BILL 138
Eff. 12-27-79

Passed 11-30-79 Approved by Governor 12-27-79
Filed 12-27-79 File No. 180
Chief Sponsor: Cox

To enact section 709.19 of the Revised Code to require an annexing municipal corporation to make payments under certain conditions to the township affected by the annexation, or under certain other conditions to another municipal corporation, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTON 1. That section 709.19 of the Revised Code be enacted to read as follows:

709.19 Redistribution of tax revenues following certain municipal annexations

Sec. 709.19. (A) As used in this Section: (1) "Annexation Period" means a period of one, two, or three consecutive twelve-month periods, whichever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.

(2) "Base Year" means the calendar year immediately preceding an annexation period.

(3) "Taxes" means the real and public utility property taxes charged by a township in the base year and payable after the reduction required by Division (A) of Section 319.301 of the Revised Code but prior to the reduction required by Division (B) of such section, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

(4) "Township Taxes in the Annexed Territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period.

(B) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twelve consecutive months, except as provided in Division (E) of this section. Each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the seven years following the annexation period:

(1) In each of the first three years, one hundred per cent of the township taxes in the annexed territory;

(2) In the fourth year, eighty per cent of the township taxes in the annexed territory;

(3) In the fifth year, sixty per cent of the township taxes in the annexed territory;

(4) In the sixth year, forty per cent of the township taxes in the annexed territory;

(5) In the seventh year, twenty per cent of the township taxes in the annexed territory.

(C) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of thirteen to twenty-four

consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the six years following the annexation period:

(1) In each of the first two years, one hundred per cent of the township taxes in the annexed territory;

(2) In the third year, eighty per cent of the township taxes in the annexed territory;

(3) In the fourth year, sixty per cent of the township taxes in the annexed territory;

(4) In the fifth year, forty per cent of the township taxes in the annexed territory;

(5) In the sixth year, twenty per cent of the township taxes in the annexed territory;

(D) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twenty-five to thirty-six consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the five years following the annexation period:

(1) In the first year, one hundred per cent of the township taxes in the annexed territory;

(2) In the second year, eighty per cent of the township taxes in the annexed territory;

(3) In the third year, sixty per cent of the township taxes in the annexed territory;

(4) In the fourth year, forty per cent of the township taxes in the annexed territory;

(5) In the fifth year, twenty per cent of the township taxes in the annexed territory.

(E) If after an annexation period for which payments

are being made or are to be made to a township by one or more municipal corporations under Division (B), (C), or (D) of this section, the remainder of the unincorporated territory of the township is annexed to another municipal corporation or incorporates as a municipal Corporation, the balance of the payments due the township under division (B), (C) or (D) of this section shall be made to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory.

No payment shall be made to a municipal corporation pursuant to this division unless the remainder of the unincorporated territory of the township referred to in this division constitutes at least fifty per cent of the area of the unincorporated area of the township prior to the annexation period.

(F) After consultation with the chief executive officer of the municipal corporation and the board of township trustees, the county auditor shall determine by which of the following methods the municipal corporations that annexed township territory shall pay the township the amounts prescribed in divisions (B) to (D) of this section, except that if the payments are made pursuant to Division (E) of this Section, they shall be made by the first method listed below:

(1) The county auditor shall issue a warrant semiannually against the taxes charged and payable against real and public utility property located in the municipal corporation and the taxes levied against tangible personal property located in the municipal corporation, and the county treasurer shall distribute such amount to the township or, pursuant to Division (E) of this section, to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation

incorporated from the remainder of the township territory; or

(2) The county budget commission shall pay such amounts to the township from the amount apportioned to the municipal corporations from the undivided local government fund. The payment shall be over and above the amount apportioned to the township pursuant to Section 5747.51 or 5747.53 of the Revised Code, and the apportionment of the municipal corporations shall be reduced by like amounts.

(G) Upon written notification to the county auditor and the chief executive officer of each municipal corporation that annexes township territory during an annexation period, a board of township trustees may decline to accept the payments required under Divisions (B), (C), and (D) of this Section, and a municipal corporation may decline to accept the payments required under Division (E) of this Section.

SECTION 2. Petitions for annexation filed pursuant to Chapter 709, of the Revised Code that are pending on the effective date of this act shall be governed by the terms of this act.

SECTION 3. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate action is necessary to ensure that pending annexations will not be excluded from the provisions of the act. Therefore, this act shall go into immediate effect.

VERNAL G. RIFFE, JR.
Speaker of the House of Representatives.

OLIVER OCASEK
President of the Senate.

Office-Supreme Court, U.S.
FILED
MAR 31 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-216

In The

Supreme Court of the United States

October Term, 1984

BOARD OF TRUSTEES, MIAMI TOWNSHIP,
Petitioner,

vs.

CITY OF MIAMISBURG,
CITY OF WEST CARROLLTON,
CITY OF MORAINE, and
ROBERT L. RODERER, Auditor of
Montgomery County, Ohio,
Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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I. QUESTION PRESENTED FOR REVIEW

Does a political subdivision of a state have standing to contest the constitutionality of a state law?

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No. 84-216

In The

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October Term, 1984

BOARD OF TRUSTEES, MIAMI TOWNSHIP,
Petitioner,

vs.

CITY OF MIAMISBURG,
CITY OF WEST CARROLLTON,
CITY OF MORAINE, and
ROBERT L. RODERER, Auditor of
Montgomery County, Ohio,
Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE SECOND DISTRICT COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

II. STATUTORY PROVISIONS INVOLVED

A. Ohio Revised Code Annotated Section 503.07 (Page 1979)

When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the

limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township.

B. Ohio Revised Code Annotated Section 709.19 (Page Supp. 1983)

The text of this statutory provision appears in the appendix to this petition.

III. STATEMENT OF THE CASE

On October 7, 1980, the City of Miamisburg, Ohio, enacted two ordinances accepting for annexation to the city two separate areas of petitioner, Miami Township. One area annexed contained 342 acres, the other contained 277 acres. Both annexations were proper and pursuant to Ohio law. The Cities of West Carrollton, Ohio and Moraine, Ohio, also completed annexations of territory within the twelve-month period from August 10, 1980 to August 9, 1981.

Ohio law allows a municipality to adjust its boundaries and by so doing detach itself from the surrounding township. This action is authorized by Ohio Revised Code Section 503.07. When a municipality exercises this option

and detaches itself from the township, the municipality becomes its own territorial township, but this territorial township ceases any function as a civil township. The municipality exercises all civil authority within its corporate limits. The unincorporated territory remaining with the township retains its civil function as a political subdivision. Ohio Attorney General Opinions, OAG 77-031; OAG 1954-4642.

However, when a municipality does not exercise this option available to it under Section 503.07 of the Ohio Revised Code, the municipality remains a part of the civil township. *Halsey v. Ward,* 17 Ohio St. 543 (1867). With this alternative the residents of the municipality retain their right to vote for township trustees, and they continue to pay a certain percentage of property taxes on their property to the township. In short, the municipality remains a part of the township as a political subdivision.

The respondent, City of Miamisburg, has not exercised this option authorized under Section 503.07 of the Ohio Revised Code. Thus, the City of Miamisburg remains a part of Miami Township. On the other hand, the City of West Carrollton has taken this action and no longer is part of the territory of Miami Township. The respondent, City of Moraine, has exercised this option for part of its territory, but has not as yet taken the action for some of its more recent annexations.

The Ohio legislature enacted Senate Bill 138 and it became effective as law on December 27, 1979. This bill was codified as Ohio Revised Code Section 709.19 (Page Supp. 1983). Section 709.19 provides for a system of compensating a township when a designated percentage of

its total taxable property has been annexed by a municipality or municipalities within a twelve-month period.

The respondent, City of Miamisburg, notified the Montgomery County Auditor that it deemed itself entitled to the real, public utility, and tangible personal property taxes paid within the annexed territories after the November 7, 1980, effective date of annexation. The petitioner, Board of Trustees, Miami Township, also informed the Auditor that it considered itself entitled to those tax monies due to the enactment of Section 709.19 of the Ohio Revised Code. These conflicting claims for the same tax monies prompted the Montgomery County Auditor to file a complaint on July 19, 1982, requesting a judicial interpretation of Section 709.19 and a declaratory judgment.

A trial was held in the Common Pleas Court of Montgomery County on November 4, 1982, before the Honorable William H. Wolff, Jr. Judge Wolff decided that for the purposes of Section 709.19 of the Ohio Revised Code, the term "township" did not include a municipal corporation contained within that township that had never exercised its option to detach itself from that township. This decision was filed on March 30, 1983.

The Cities of Miamisburg, West Carrollton, and Moraine appealed to the Court of Appeals for the Second Appellate District, Montgomery County, Ohio. One of the issues raised by the municipalities in their appeal was whether the word "township" as used in Section 709.19 of the Ohio Revised Code should be interpreted consistently with Section 503.07 of the Ohio Revised Code and, thus, include a municipal corporation that had not detached itself from the township.

The Court of Appeals, in its decision filed on December 15, 1983, held that for the purposes of Section 709.19 of the Ohio Revised Code the word "township" must be interpreted consistently with that word as it is used elsewhere throughout the Ohio Revised Code. Thus, the Court of Appeals' decision found that the total taxable property in the township includes the taxable property located within a municipal corporation that has not exercised its option of detaching itself from that township.

The petitioner, Board of Trustees, Miami Township, sought to appeal this decision to the Supreme Court of Ohio. On April 4, 1984, the Ohio Supreme Court overruled Miami Township's Motion For an Order Directing The Court of Appeals to Certify Its Record. Miami Township then filed a Motion for Rehearing. This Motion was denied by the Ohio Supreme Court on May 9, 1984.

———o———

IV. REASONS FOR DENYING THE WRIT

A. No Federal Question Presented

Quite simply stated, this case does not present a federal issue to be decided. The Statements of Facts, as submitted by petitioner, as well as by respondents, clearly demonstrate that this case involves the interpretation of a state statute by a state court which directs the apportionment of property taxes between various state political subdivisions. This matter does not infringe upon any federal statutory or constitutional right.

Petitioner has attempted to manufacture a federal claim based upon the Equal Protection clause of the 14th

Amendment to the United States Constitution. Petitioner has cited a plethora of cases involving various facets of law regarding the Equal Protection clause. However, a distinguishing feature of the majority of these cases cited is that they involve the unequal treatment of individual people by various political subdivisions or statutes. *City of Chicago v. Sturges,* 222 U.S. 313 (1911); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Hunter v. Pittsburgh,* 207 U.S. 161 (1907); *Kramer v. Union Free School District,* 395 U.S. 621 (1969); *Harper v. Bd. of Elections,* 383 U.S. 663 (1966); *Cipriano v. City of Houma,* 395 U.S. 701 (1969); *Phoenix v. Kolodziejski,* 399 U.S. 204 (1970); *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Craig v. Boren,* 429 U.S. 190 (1976); *Dunn v. Blumenstein,* 405 U.S. 330 (1972). A few cases have involved disputes between two or more private parties wherein one of the parties was relying on a state law that created an arbitrary or unfair distinction between parties to the detriment of one of the parties. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972); *Reed v. Reed,* 404 U.S. 71 (1971). Petitioner has cited no cases for the proposition that state law may not make distinctions between municipal corporations that remain a part of the surrounding civil township and municipal corporations that choose to detach themselves from a neighboring township.

The issues raised in this case are purely those of state law. The proportion of property taxes among political subdivisions in a state remains a matter to be decided by the state legislature. Similarly, the interpretation of that state legislation remains a matter for state courts.

B. Lack of Standing

This Court has consistently held that a political subdivision of a state does not have standing to challenge the constitutionality of a state law. *Stewart v. Kansas City,* 239 U.S. 14 (1915). As the Court stated, in *Stewart:*

> It is manifest that the statute assailed was enacted by the State in regulation of its municipalities, and the power to do this is very broad. . . . This power of creation and control may be exercised in many ways and may give rise to actual or asserted inequalities. It has been exercised to enlarge or contract the boundaries of municipal corporations, invest them with special powers, divide and apportion their property.

Id. at 16. Thus, the Court has recognized that political subdivisions of a state, including townships and municipal corporations, are creatures of that state and cannot challenge the federal constitutionality of a state law regulating them.

The reasoning of the *Stewart* decision was applied specifically to a challenge brought under the Equal Protection clause of the 14th Amendment. *Newark v. New Jersey,* 262 U.S. 192 (1923). In *Newark,* the Court stated:

> The enforcement by the State of the provision of the act imposing upon the City the specified annual payments for such diversion of water does not violate the equal protection clause of the Fourteenth Amendment. The regulation of municipalities is a matter peculiarly within the domain of the State. . . . The City cannot invoke the protection of the Fourteenth Amendment against the State.

Id. at 196. Thus, the Court has previously held that a city cannot invoke the Fourteenth Amendment of the United States Constitution against a state statute. This reason-

ing is just as applicable to a township. A township, as a political subdivision of a state, cannot claim the protection of the Fourteenth Amendment against a state statute.

The issues in these cases have received more recent discussion by the Ninth Circuit Court of Appeals. *South Lake Tahoe v. California Tahoe Regional Planning Agency,* 625 F.2d 231 (9th Cir. 1980). In *Tahoe,* the Ninth Circuit Court of Appeals stated:

> It is well established that 'political subdivisions of a state may not challenge the validity of a state statute under the Fourteenth Amendment.' . . . This is true whether the defendant is the state itself or another of the state's political subdivisions. . . . Thus, the City may not challenge CTRPH's plans and ordinances on constitutional grounds.

Id. at 233.

The Court of Appeals for the Second Appellate District, Montgomery County, Ohio has provided its interpretation of Section 709.19 of the Ohio Revised Code. Petitioner attempted to present this issue to the Ohio Supreme Court but the Supreme Court refused to hear the case. Thus, the interpretation of the word "township" in Section 709.19, as adopted by the Court of Appeals, is the interpretation that stands as the proper one. Thus, petitioner's challenge of this interpretation of Section 709.19 on the ground that it violates the Equal Protection clause of the 14th Amendment is a challenge of the constitutionality of Section 709.19 itself.

———o———

V. CONCLUSION

Annexation of unincorporated township territory by a neighboring municipal corporation is a matter controlled by state law. The state legislature establishes criteria that must be met for an annexation to take place. Petitioners have infused their argument with emotional language, charging among other things that certain annexations are inherently unjust. Clearly, this charge is a contradiction in terms. In order for an annexation to be authorized it must meet the criteria established by law. When the annexation meets these criteria, it is lawful, proper, and just. An annexation that was inherently unjust would not be authorized because it would not meet the lawful requirements.

Section 709.19 of the Ohio Revised Code provides for a system of compensation for a township that loses a set percentage of its tax base to annexations within a twelve-month period. If the term "township" in Section 709.19 is interpreted to be consistent with other Ohio law, the annexations of territory from Petitioner, Miami Township, by Respondents, Cities of Miamisburg, West Carrollton, and Moraine, do not reach the necessary percentage to trigger the compensation mechanism of the statute. The Court of Appeals decision interprets "township" in this manner, and the statute has not been triggered. This question began as and remains an issue of state law.

For these reasons, a writ of certiorari should not be granted.

Respectfully submitted,

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APPENDIX A

OPINION NO. 77-031

Syllabus:

If a municipal corporation fails to initiate proceedings pursuant to R.C. 503.07 to adjust township boundaries, the inhabitants of township territory that has been annexed to such a municipal corporation are still subject to, and eligible to vote on township tax levies and issues.

TO: Ted W. Brown, Secretary of State, Columbus, Ohio
BY: William J. Brown, Attorney General, June 7, 1977

I have before me your request for my opinion inquiring whether the inhabitants of territory that has been annexed to a municipal corporation are eligible to vote on township levies and issues where the municipal authorities have not intiated proceedings to adjust the township limits as provided by R.C. 503.07.

R.C. 503.07 contains provisions by which township boundary lines can be made identical with those of the municipality of which it is part when, for any reason, such lines are not identical. This would be the case in the instant situation where a municipality has, pursuant to R.C. Chapter 731, annexed territority which comprises part of a township. Thus, in such a case the new boundaries of the municipality would extend into the township and conversely the township boundaries would extend into the municipality. The purpose of R.C. 503.07 is to eliminate such a situation by allowing for the alteration of the

township boundary lines to be identical with those of the municipality, so that the part of the township that was annexed would be wholly and exclusively within the municipal boundaries.

If, however, a municipality does not initiate the procedure set forth in R.C. 503.07 the annexed township territory does not cease to be a component part of the township or townships in which it is situated. *Halsey v. Ward,* 17 Ohio St. 544 (1967); 1954 Op. Att'y. Gen. No. 4642, p. 648; 1924 Op. Att'y. Gen. No. 1213, p. 82.

In 1954 Op. Att'y. Gen. No. 4642, p. 648, the first and fourth branches of the syllabus provide as follows:

> "1. The extension of the limits of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.
>
> ". . .
>
> "4. Where the limits of a municipality extend over into the territory of a township the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township."

It is clear, therefore, that when township and municipal boundaries overlap, the inhabitants of the overlapping

territory are considered residents of both the municipality and the township with all of the benefits and obligations attendant thereto.

The subject of taxation of township property within a municipality was specifically discussed in 1924 Op. Att'y. Gen. No. 1213, p. 82, wherein it was stated:

> "The practice is and seems always to have been to make the general levies of the township to cover all property within the township. Because some part of the territory of a township becomes a village does not seem to operate to take the area within the village out of the township for voting or taxing purposes."

Further, it was noted in this opinion:

> "It will be noted therefore that it is the general rule that a township can levy a tax on all the taxable property located in the township including the property in a village or city within the township, unless an exception is found in the statute providing for the tax."

Thus, it would appear that property of the township, even though it is also located within the limits of a municipality, still retains a complete and independent existence as part of the township. The inhabitants of the territory located within the municipality still retain their full voting rights with regard to the election of the various township officers and the property of such territory still remains subject to township tax levies, unless there is some exception in the statute providing for the specific tax. Accordingly, the owners of such property would clearly have the right to vote on levies and issues which might result in any additional taxation to their property. *See:* 1944 Op. Att'y Gen. No. 7038, p. 406 and 1939 Op. Att'y. Gen. No. 198, p. 249 (dealing with the issue of taxation of the township area located within a municipality).

The problems created when municipal and township boundaries overlap were discussed in 1954 Op. Att'y. Gen. No. 4642, p. 648, where it was noted as follows:

> "It is of course readily foreseeable that where a municipal and a township boundary overlap, in part, inequitable situations may arise both with respect to the citizens of a municipality within the township as well as with respect to citizens of the municipality. For example, the citizens of the municipality might well find themselves subject to taxation both by the township as well as the municipality within which they reside."

As my predecessor specifically noted in the foregoing opinion, it is advisable when a municipality annexes a part of a township that the provisions of R.C. 503.07 be followed as a matter of course in order to avoid the burdensome and inequitable situations that would otherwise result.

In the absence of such a procedure, however, I must conclude that the inhabitants of a township territory that has been annexed to a municipal corporation are still subject to and eligible to vote on township tax levies and issues.

In reaching this conclusion, I am not unaware of the operation and effect of R.C. 709.12. This section, which provides for an apportionment of the indebtedness and a division of the funds of the township between the township and the municipality, when its territory is annexed, provides as follows:

> "When proceedings have been commenced to annex a portion of a township, or portions of more than one township, to a municipal corporation upon which the tax levies made by the board of township trustees

for the payment of the township debt do not apply, the county auditor shall ascertain and apportion the amount of existing net indebtedness of the township which shall be assumed and paid by the municipal corporation. The apportionment shall be made in the proportion of the total duplicate for the annexed territory transferred to the municipal corporation to the total tax duplicate remaining in and for the unannexed portion of the township. The auditor shall ascertain, adjust, and divide between the municipal corporation and the unannexed portion of the township any *unencumbered balance on hand* to the credit of any fund of such township, in the same proportion as is provided in this section for the division and apportionment of indebtedness. No division shall be made of a balance in any fund of a township that is required for the retirement of its indebtedness. In case any net indebtedness is assumed by the municipal corporation as provided in this section, the legislative authority of such municipal corporation shall provide for the payment of such indebtedness by the levy of taxes therefor, or by the appropriation from an appropriate fund. The proceeds of such levy or appropriation shall be transferred to the proper authorities of the township for the final redemption of its indebtedness." (Emphasis added)

It is clear that R.C. 709.12 contemplates the division of all funds whatever their source, except proceeds of tax levies intended for the payment of interest or principle of township indebtedness. However, in 1943 Op. Att'y. Gen. No. 6475, p. 616 my predecessor discussed an earlier version of this statute which was, for purposes of this opinion, identical to the one now in effect. The third branch of the syllabus provides as follows:

"In the division of funds contemplated by Section 3557-1, General Code, [now R.C. 709.12] only the unencumbered balances of funds actually on hand can be considered, and moneys in the process of collection

are not included in the division required by said section."

This proposition was again stated in 1960 Op. Att'y. Gen. No. 1901, p. 720.

Therefore, it is clear that the division of funds contemplated by R.C. 709.12 involves only those unencumbered funds of the township which are on hand at the time of the annexation to the municipality. Any subsequent funds coming into the treasury of the township need not be divided in the manner prescribed by R.C. 709.12. As such, I must conclude that the provisions of R.C. 709.12 in no way alter the conclusions reached above that the inhabitants of the township territory which has been annexed to a municipality would be subject to, and eligible to vote on, township tax levies and issues. The division of the funds contemplated is not ongoing. Rather, it is done only once at the time of the annexation of the township territory.

Therefore, it is my opinion and you are so advised that if a municipal corporation fails to initiate proceedings pursuant to R.C. 503.07 to adjust township boundaries, the inhabitants of township territory that has been annexed to such a municipal corporation are still subject to, and eligible to vote on township tax levies and issues.

APPENDIX B

1. ANNEXATION OF TERRITORY IN ADJACENT TOWNSHIP—EXTENSION, LIMITS OF MUNICIPALITY—DOES NOT PER SE AFFECT LIMITS OR POLITICAL EXISTENCE OF TOWNSHIP—AUTHORITY TO INITIATE PROCEEDINGS TO ADJUST TOWNSHIP LIMITS—MUNICIPAL LIMITS—ABOLITION OF TOWNSHIP OFFICES—SECTIONS 503.07, 503.22 RC.

2. MUNICIPAL CORPORATION — LEGISLATIVE AUTHORITY—PETITION TO COUNTY COMMISSIONERS FOR CHANGE IN TOWNSHIP LIMITS —ERECTION OF NEW TOWNSHIP—PROCEDURE BY COMMISSIONERS—SECTIONS 503.07, 503.14 RC.

3. TOWNSHIP COMPLETELY WITHIN LIMITS OF MUNICIPALITY—SECTION 703.22 RC OPERATIVE—ALL TOWNSHIP OFFICES ABOLISHED —EXCEPTION, JUSTICES OF PEACE AND CONSTABLES—CONTINUE TO EXERCISE FUNCTIONS—THEY ARE ELECTED AT REGULAR MUNICIPAL ELECTIONS.

4. LIMITS OF MUNICIPALITY—EXTENDED OVER TO LIMITS OF TOWNSHIP—POLITICAL EXISTENCE OF TOWNSHIP—NOT AFFECTED—ELECTORS OF MUNICIPALITY RESIDING WITHIN OVERLAPPING PORTION OF TOWNSHIP—MAY VOTE FOR TOWNSHIP TRUSTEE, TOWNSHIP CLERK, JUSTICES OF PEACE AND CONSTABLES TO BE ELECTED IN TOWNSHIP.

5. TOWNSHIP COMPLETELY WITHIN LIMITS OF MUNICIPALITY—WHEN SECTION 703.22 RC BECOMES OPERATIVE—RESIDENTS OF TOWNSHIP—ELECTORS OF CITY EXISTING PRIVILEGES—SECTION 503.07 RC.

SYLLABUS:

1. The extension of the limits of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.

2. Section 503.07, Revised Code, is mandatory to the extent that where the legislative authority of a municipal corporation properly petitions the board of county commissioners for a change in township limits, in order to make them identical, in whole or in part, with the limits of a municipal corporation, or to erect a new township out of the portion of the township included within the limits of the municipal corporation, said board must, upon the presentation of such petition and in regular or adjourned session, change the limits of the township or erect a new township as provided by Section 503.14, Revised Code.

3. Where a township is completely within the limits of a municipality and there is an identity in whole or in part of township and municipal limits. Section 703.22, Revised Code, becomes operative and all township offices are abolished, except that justices of the peace and constables

continue to exercise their function and are elected at regular municipal elections as provided by said section.

4. Where the limits of a municipality extend over into the territory of a township, the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township.

5. Where a township is completely within the limits of a municipality but no part of the township and municipal limits are or have ever been identical or coterminous, Section 703.22, Revised Code, does not become operative unless and until there has been an appropriate petition to the board of county commissioners pursuant to the provisions of Section 503.07, Revised Code, and residents of said township, notwithstanding they are also electors of the city, may note for township trustees, township Clerks, justices of the peace, and constables to be elected in such township.

Columbus, Ohio, December 15, 1954

Hon. Ted W. Brown, Secretary of State
Columbus, Ohio

Dear Sir:

Your request for my opinion contains the following questions:

"1. Where a municipal corporation extends into one or more townships, do electors of that portion of a city which extends into a township, vote for township trustees, township clerk, justice of the peace, and constable, there being no municipal court in such city?

"2. Where a municipal corporation is formed from three different townships and no part of any of the townships is outside of the boundaries of the municipality, does Section 703.22 of the Revised Code apply, and are such officers elected in such townships where there is no municipal court in such city?"

Your questions relate to a situation where no municipal court existed, and will be so considered, since municipal courts have jurisdiction within the corporate limits of their respective municipal corporation and within the townships specifically designated by the municipal court act, the statute providing that, "upon the institution of a municipal court, the jurisdiction of justices of the peace and police justices in all civil and criminal causes terminates in any township or municipal corporation which is entirely within the territory and in that part of any township which is included within the territory." See Sections 1901.02 and 1901.04, Revised Code.

With respect to your first inquiry, it has been held that upon the organization of a city the limits of which are not coterminous with those of any township, the territory within such city does not cease to be a component part of the township or townships within the limits of which it is situated; that "in the offices of township trustee, clerk, treasurer, justice of the peace and constable, electors and taxpayers of the city have in some or in all respects, a like interest with the electors of the townships outside the city limits, and are entitled to vote in the choice of them." Halsey v. Ward, 17 Ohio St., 543; 28 Ohio Jurisprudence, p. 1079, Sec. 670.

The court in its opinion at page 546, said:

"Neither as a matter of theory or practice, is there any necessary difficulty in the existence and harmoni-

ous working of a civil township organization, and, at the same time, of a city organization within the limits of such township, or within the limits of more than one township; and the statutes nowhere provide, either expressly or by just implication, that, on the organization of a city within the limits of a township or townships, the territory within the city limits shall cease to be a part of the township or townships from which the same was taken. But, there are clear indications of a contrary legislative intent."

The Halsey case was followed in Opinion 1213, Opinions of the Attorney General for 1924, page 82, where it was said:

"Because some part of the territory of a township becomes a village does not seem to operate to take the area within the village out of the township for voting or taxing purposes. Village electors vote for township officers and are often elected as such officers."

The political existence of the township in such case was also upheld in Opinion No. 198, Opinions of the Attorney General for 1939, p. 249, involving a vote on a tax levy for the establishment of a firemen's indemnity fund. It was there held that a township could levy such tax on all taxable property lying in the township, including the property in a village located in the township.

Opinion No. 7038, Opinions of the Attorney General for 1944, page 406, went even further. It sustained a township levy for maintaining a township park, despite the total absorption of the township by the incorporation of two municipalities. It was stated in the syllabus:

"The fact that all the area of a township has been incorporated into two municipalities does not in any way affect the existence or official organization of the

township, and taxes levied or to be levied for township purposes will be collected and paid into the township treasury as provided by law."

The Attorney General thus gave his reasons, at page 409, for not applying Section 703.22, Revised Code, 3512, G. C.:

> "It will be observed from an examination of the above quoted section, that it applies only when the corporate limits of *a city or village* become identical with those of a township. It is obvious that the legislature enacted that statute in recognition of the fact that where the territory of a township was identical with that of a municipal corporation there could be no purpose in having two sets of officers administering the affairs of the subdivision and therefore all township offices excepting those of justices and constables were abolished and their duties are to be performed by municipal officers. Plainly, that reason does not exist where the entire territory of a township becomes incorporated into two or more municipal corporations and obviously it would not be practicable for the officers and council or either one of such municipalities to take over the government of the entire township. Accordingly, it seems clear to me that the existence of Conneaut Township has been in no wise affected, and the entire township, including the city of Conneaut and the village of Lakeville, is still subject to control as a township by the officers who are provided by law for all townships of the state. * * *" (Emphasis added.)

It is, therefore, apparent that as a general rule a township retains its existence as a political entity, notwithstanding the inclusion of some or all of its territory within the municipal limits. In arriving at this conclusion I am, moreover, aware of the provisions of Section 703.22, Revised Code, which provides in substance that upon iden-

tity of municipal and township limits township offices generally cease and the duties thereof are assumed by the corresponding offices of the municipal corporation. The section, however, does not purport to abolish the township, but merely the offices thereof.

It is, of course, readily forseeable that where a municipal and a township boundary overlap, in part, inequitable situations may arise both with respect to the citizens of a municipality within the township as well as with respect to citizens of the township without the boundaries of the municipality. For example, the citizens of the municipality might well find themselves subject to taxation both by the township as well as the municipality within which they reside. Opinion No. 1213, supra. At the same time, assuming a situation where that portion of a township lying within the limits of the municipality was more densely populated in comparison to the rest of the township, the residents of the township without the boundaries of the municipal corporation might well find that their township affairs are virtually controlled by the urban residents who might conceivably have little or no appreciation of the problems peculiar to the non-urban territory. It should be noted, however, that neither the urban residents of the township nor the residents of the township without the boundaries of the municipality are without a statutory remedy in such case. With respect to the remedies of the residents of the municipal corporation, Section 503.07, Revised Code, provides as follows:

> "If the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, and

the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, petitions the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation, the board, on presentation of such petition, with the proceedings of the legislative authority authenticated, at a regular or adjourned session, may change the boundaries of the township or erect such new township."

Insofar as the residents of the township outside the municipal boundaries are concerned, Section 503.09, Revised Code, likewise provides:

"Where a township contains a city, if a majority of the freehold electors owning land in the portion of such a township outside such city limits, petitions, with a map accurately setting forth such territory, praying to have such territory erected into a new township, and excluding the territory within the city, the board of county commissioners shall enter an order erecting such territory into a new township, the boundaries of which need not include twenty-two square miles of territory. Upon the erection of such new townships, the territory lying within the limits of the city in the original township shall be considered as not being located in any township."

For the purpose of avoiding some of the situations which I have heretofore outlined, it would undoubtedly be advisable in those cases where a municipality annexes a part of a township, that the provisions of Section 503.07, supra, be followed as a matter of course and as an incident to the annexation proceedings. Although Section 503.07, supra, uses the permissive "may" with respect to the change of the boundaries of the township upon the

petition of the legislative authority of the municipality I am nevertheless of the opinion that such a boundary change is mandatory upon the board of county commissioners if as and when a proper petition is presented by the municipal corporation. My conclusion in this respect is based largely on the provisions of Section 503.14, Revised Code, which provides as follows:

> "When the change of boundaries of township is required by reason of the extension of the limits of a municipal corporation, such change shall be made be (sic) annexation to the township in which the municipal corporation or the greater part of it was previously situated, of such parts of other townships as are covered by such extension."

The section above quoted was originally enacted as section 482 of the Municipal Code in 70 Ohio Laws, 4. As originally enacted it provided substantially the same as present Section 503.14, Revised Code, except that after the word "required" the words "under Section 480" appeared. Section 480 of the former Municipal Code is now substantially Section 503.07, Revised Code. Notwithstanding that this section reference was eliminated upon the incorporation of the Municipal Code into the General Code and subsequently upon the incorporation of the General Code into the present Revised Code. I am nevertheless convinced that no substantial change was intended and that the use of the word "required" was intentional and not accidental, and indicated a legislative understanding that when a petition was duly presented to the Board of County Commissioners for an appropriate change in the township boundaries, that such change was then a "required" one and was therefore mandatory.

Considering now the second aspect of your inquiry, it would appear that it resolves itself into a determination

as to whether under the circumstances disclosed, Section 703.22, Revised Code, to which I have referred earlier in this opinion, applies. Said section provides as follows:

> "When the limits of a municipal corporation become identical with those of a township, all township offices shall be abolished, and the duties thereof shall be performed by the corresponding officers of the municipal corporation, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employees. Such justice and constables shall be elected at regular municipal elections. All property, moneys, credits, books, records, and documents of such township shall be delivered to the legislative authority of such municipal corporation. All rights, interests, or claims in favor of or against the township may be enforced by or against such municipal corporation."

A diagram which you have enclosed for the purpose of clarifying the problem presented by your second inquiry discloses a municipal corporation composed of three adjacent townships. No portion of any of the townships is without the limits of the municipal corporation. Each of the townships has at least one common limit with the municipal corporation. Obviously, no one of the townships has a limit which is completely coterminous with the municipality, since, perforce it enjoys a common limit with one or more adjacent townships. The question then presented is whether any of the limits of any of the townships within the municipal corporation are identical within the purview of Section 703.22, supra, so as to abolish the existence of certain township offices as enumerated by that section. It is apparent, of course, that there is no complete and absolute identity of any one of the limits of

the township with the limits of the municipal corporation, under the facts as stated in your inquiry. Such a situation could only arise where the municipality was composed of a single township or where having been formed from several townships the municipality had the limits of the several townships changed under Section 503.07, Revised Code, into a single township. I think it clear that the legislature intended no such restrictive application of Section 703.22, supra. On the contrary, it would appear to have been the legislative notion to avoid a duplication of governmental functions where a township had been completely absorbed within the limits of the municipal corporation. Thus, in the question you have presented, it would appear that the partial identity of the township limits with those of the municipality, providing the township is completely within municipal limits, is sufficient to bring into operation Section 703.22, supra. Construing Section 703.22, supra, and Section 503.07, supra, in pari materia, it would appear that this is what the legislature had in mind in providing for a petition to change township lines in order to make them identical in whole or "in part" as provided by the latter section.

What has been said, however, does not answer the question which although not directly asked by you is nevertheless implicit in the foregoing discussion; that is to say, that circumstance in which a township is completely within municipal limits but no portion of the township limit is coterminous with any part of the municipal limit. Despite the legislative intent in this regard to avoid the duplication of governmental functions to which I have previously referred, there is no identity of limits, whole or partial, within the plain meaning of that word as employed in Sec-

tion 703.22, supra. In such a case construction cannot supply what plain language has failed to indicate; and the interpretation of the statute must be made in the light of the expressed intention thereof, notwithstanding the expressed intention might differ from the intended legislative expression. Slingluff v. Weaver, 66 Ohio St., 621. It follows, therefore, that in the case of a township which is completely within the limits of a municipal corporation, which does not share and has never shared any common limit with the municipal corporation, Section 703.22, supra, cannot come into operation and township offices are not abolished under and pursuant to that Section until and unless the legislative authority of the municipal corporation makes an appropriate petition to the board of county commissioners under Section 503.07, supra, in order to achieve such identity in whole or in part.

In specific answer to your questions, it is my opinion that:

1. The extension of the limit of a municipality by the annexation of territory in an adjacent township does not per se affect the limits or political existence of such township. The municipal authorities may, however, initiate proceedings under the provisions of Section 503.07, Revised Code, to adjust the township limits to make them identical in whole or in part with the municipal limits so as to accomplish the abolition of certain township offices under the provisions of Section 703.22, Revised Code.

2. Section 503.07, Revised Code, is mandatory to the extent that where the legislative authority of a municipal corporation properly petitions the board of county com-

missioners for a change in township limits, in order to make them identical, in whole or in part, with the limits of a municipal corporation, or to erect a new township out of the portion of the township included within the limits of the municipal corporation, said board must, upon the presentation of such petition and in regular or adjourned session, change the limits of the township or erect a new township as provided by Section 503.14, Revised Code.

3. Where a township is completely within the limits of a municipality and there is an identity in whole or in part of township and municipal limits, Section 703.22, Revised Code, becomes operative and all township offices are abolished, except that justices of the peace and constables continue to exercise their function and are elected at regular municipal elections as provided by said section.

4. Where the limits of a municipality extend over into the territory of a township, the political existence of a township is not affected and electors of the municipality residing within the overlapping portion of the township may vote for a township trustee, township clerk, justices of the peace and constables to be elected in such township.

5. Where a township is completely within the limits of a municipality but no part of the township and municipal limits are or have ever been identical or coterminous, Section 703.22, Revised Code, does not become operative unless and until there has been an appropriate petition to the board of county commissioners pursuant to the provisions of Section 503.07, Revised Code, and residents of said township, notwithstanding they are also electors of the city, may vote for township trustees, township clerks,

justices of the peace, and constables to be elected in such township.

Respectfully,

C. William O'Neill
Attorney General

APPENDIX C

AM. SUB. SENATE BILL 138
Eff. 12-27-79

Passed 11-30-79 Approved by Governor 12-27-79
Filed 12-27-79 File No. 180
Chief Sponsor: Cox

To enact section 709.19 of the Revised Code to require an annexing municipal corporation to make payments under certain conditions to the township affected by the annexation, or under certain other conditions to another municipal corporation, and to declare an emergency.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That section 709.19 of the Revised Code be enacted to read as follows:

Sec. 709.19 (A) As used in this Section: (1) "Antain municipal annexations

Sec. 709.19 (A) As used in this Section: (1) "Annexation Period" means a period of one, two, or three consecutive twelve-month periods, which ever is less, during which one or more municipal corporations annex territory of a township that includes at least fifteen per cent but less than one hundred per cent of the total taxable value of the real, public utility and tangible personal property subject to taxation in that township in the base year. No annexation period shall include a month that is part of another annexation period.

(2) "Base Year" means the calendar year immediately preceding an annexation period.

(3) "Taxes" means the real and public utility property taxes charged by a township in the base year and payable after the reduction required by Division (A) of Section 319.301 of the Revised Code but prior to the reduction required by Division (B) of such section, and the taxes levied for such year by the township against tangible personal property. "Taxes" excludes taxes for the payment of debt charges.

(4) "Township Taxes in the Annexed Territory" means the taxes against the real, public utility, and tangible personal property subject to taxation in the base year in territory annexed from the township to a municipal corporation during an annexation period.

(B) If the annexation of territory of any township by one or more muncipal corporations under this chapter constitutes an annexation period of twelve consecutive months, except as provided in Division (E) of this section. Each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the seven years following the annexation period:

(1) In each of the first three years, one hundred per cent of the township taxes in the annexed territory;

(2) In the fourth year, eighty per cent of the township taxes in the annexed territory;

(3) In the fifth year, sixty per cent of the township taxes in the annexed territory;

(4) In the sixth year, forty per cent of the township taxes in the annexed territory;

(5) In the seventh year, twenty per cent of the township taxes in the annexed territory.

(C) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of thirteen to twenty-four consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the six years following the annexation period:

(1) In each of the first two years, one hundred per cent of the township taxes in the annexed territory;

(2) In the third year, eighty per cent of the township taxes in the annexed territory;

(3) In the fourth year, sixty per cent of the township taxes in the annexed territory;

(4) In the fifth year, forty per cent of the township taxes in the annexed territory;

(5) In the sixth year, twenty per cent of the township taxes in the annexed territory;

(D) If the annexation of territory of any township by one or more municipal corporations under this chapter constitutes an annexation period of twenty-five to thirty-six consecutive months, except as provided in Division (E) of this section, each municipal corporation that annexed territory of that township during that annexation period shall pay the township during each of the five years following the annexation period:

(1) In the first year, one hundred per cent of the township taxes in the annexed territory;

(2) In the second year, eighty per cent of the township taxes in the annexed territory;

(3) In the third year, sixty per cent of the township taxes in the annexed territory;

(4) In the fourth year, forty per cent of the township taxes in the annexed territory;

(5) In the fifth year, twenty per cent of the township taxes in the annexed territory.

(E) If after an annexation period for which payments are being made or are to be made to a township by one or more municipal corporations under Division (B), (C), or (D) of this section, the remainder of the unincorporated territory of the township is annexed to another municipal corporation or incorporates as a municipal Corporation, the balance of the payments due the township under division (B), (C) or (D) of this section shall be made to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory.

No payment shall be made to a municipal corporation pursuant to this division unless the remainder of the unincorporated territory of the township referred to in this division constitutes at least fifty per cent of the area of the unincorporated area of the township prior to the annexation period.

(F) After consultation with the chief executive officer of the municipal corporation and the board of township trustees, the county auditor shall determine by which of the following methods the municipal corporations that

annexed township territory shall pay the township the amounts prescribed in divisions (B) to (D) of this section, except that if the payments are made pursuant to Division (E) of this Section, they shall be made by the first method listed below:

(1) The county auditor shall issue a warrant semiannually against the taxes charged and payable against real and public utility property located in the municipal corporation and the taxes levied against tangible personal property located in the municipal corporation, and the county treasurer shall distribute such amount to the township or, pursuant to Division (E) of this section, to the municipal corporation to which the remainder of the township territory was annexed or to the municipal corporation incorporated from the remainder of the township territory; or

(2) The county budget commission shall pay such amounts to the township from the amount apportioned to the municipal corporations from the undivided local government fund. The payment shall be over and above the amount apportioned to the township pursuant to Section 5747.51 or 5747.53 of the Revised Code, and the apportionment of the municipal corporations shall be reduced by like amounts.

(G) Upon written notification to the county auditor and the chief executive officer of each municipal corporation that annexes township territory during an annexation period, a board of township trustees may decline to accept the payments required under Divisions (B), (C), and (D) of this Section, and a municipal corporation may decline to

accept the payments required under Division (E) of this Section.

SECTION 2. Petitions for annexation filed pursuant to Chapter 709, of the Revised Code that are pending on the effective date of this act shall be governed by the terms of this act.

SECTION 3. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reason for such necessity lies in the fact that immediate action is necessary to ensure that pending annexations will not be excluded from the provisions of the act. Therefore, this act shall go into immediate effect.

VERNAL G. RIFFE, JR.
Speaker of the House of Representatives.

OLIVER OCASEK
President of the Senate.